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No. 482. 149

Supreme Court of the United States,

OCTOBER TERM, 1902.

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JAMES H. McKENNEY,
Clerk.

THE CENTRAL STOCK YARDS COMPANY, - - - - *Appellant*,

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - - - - - - - - *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLANT.

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JOHN L. DODD,
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JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

13545

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No. 482. *VERSUS*

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - *Appellee.*

Brief for Appellant.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT.

This action is before this court upon an appeal from the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the United States Circuit Court for the Western District of Kentucky, dismissing appellant's bill of complaint for want of jurisdiction in equity of the matters alleged and for want of equity in the said bill.

The bill (see Record, 1 to 10) was filed January 11, 1902, and therefrom it appears that the appellant, Central Stock Yards Company, was and is a duly and legally authorized and organized corporation under the laws of the State of Delaware, and as such, from compliance with the Constitution and laws of the State of Kentucky, authorized to contract and be contracted with, sue and be sued in its corporate name, and to construct and operate a general stock yard business in said State.

The appellee, Louisville & Nashville Railroad Company, is, and was at the times in the bill of complaint mentioned, and has been for many years, a railroad corporation, created and organized under and by virtue of the laws of the State of Kentucky, with power, in its corporate name, to contract and be contracted with, sue and be sued, and to conduct and operate a steam railroad in and through Kentucky and elsewhere, with its chief office and terminus in Louisville, Kentucky; that it is, and has for years been operating and maintaining a railroad in Kentucky and in the States of Tennessee, Alabama, Georgia, Mississippi, Louisiana, Florida, Indiana, and Illinois, and as such is a common carrier of passengers and freight, and engaged in the transportation of passengers and property wholly by railroad along some of its lines, and partly by railroad and partly by water on other of its lines, under a common control, management, and arrangement for a continuous carriage and shipment from one State in the United States to another State in the United States.

The Southern Railway Company in Kentucky, is and was at the times in the bill of complaint mentioned, a duly created, organized, and operating railway system, in Kentucky, under the laws of said State.

It appears from the bill (see Record, 2) that appellant had, prior to the filing of its bill, constructed and had in operation a large and extensive plant just outside of the city of Louisville, and on the lines of the Southern Railway Company in Kentucky; and the appellant at said time and now has a modern and well equipped plant, with the latest improved and best facilities, and with ample capital and premises for receiving, unloading, feeding, watering, caring for, weighing, and having sales made of live stock of every character, and on the most economical basis; and that appellant, with the said Southern Railway Company in Kentucky, had, at the time of the filing of the bill, and now has, constructed switches and over four thousand feet of trackage connecting the said Southern Rail-

way Company system with the yards and plant of appellant; that appellant's plant is on the line of the Southern Railway Company, and about nine miles from its terminus in the city of Louisville, and that prior to the filing of the said bill the said Southern Railway Company had regularly established a station at the plant of appellant, which is known as Central Stock Yards, Kentucky, and that said Southern Railway Company, prior to the filing of said bill, had, in due form and in the usual manner, given notice of the establishment of said station to all of its agents, and to all connecting railways or common carriers in Kentucky, including appellee; and it further notified all of said railways and common carriers entering the city of Louisville, that it, Southern Railway Company, would be, after November 1, 1901, and that it ever since has been, and is now, ready, willing and able to accept at points of physical connection between its tracks and those of appellee at Louisville, Kentucky, live stock of every character consigned to appellant, or to any person, firm, or corporation at Central Stock Yards, Kentucky; and further that it, Southern Railway Company, would be, has ever since been, and is now, willing to be responsible to such connecting common carrier for the delivery of all such live stock delivered to it at such points of connection and the collection of all charges on same, and would promptly return to such points of connection all empty cars.

It further appears from the bill (see Record, 3 and 4) that there are three points of physical connection between the tracks of appellee and the said Southern Railway Company in Kentucky, at Louisville, at which the two railway systems have heretofore received and delivered, and are daily receiving and delivering each one to the other, and from the other, freight in car load lots or less for delivery to consignees on the track or tracks of the one or the other.

Prior to the filing of appellant's bill the appellee announced its intention to, and has ever since refused, and

now refuses to receive, bill, transport, transfer, switch, or deliver any live stock—the shipments of which originate outside of the State of Kentucky—consigned or tendered to be consigned to any point of physical connection between its said line and the lines of the said Southern Railway Company in Kentucky, at Louisville, Kentucky, destined to appellant at Central Stock Yards, Kentucky, or destined to any individual, partnership, firm or corporation at Central Stock Yards, Kentucky, although requested so to do by shippers, owners, and dealers in live stock.

When live stock is tendered to defendant in error at any of its stations outside of the State of Kentucky for consignment to appellant, or to any person doing business at the plant of appellant, via Southern Railway Company in Kentucky, at Louisville, appellee refuses to receive, bill, or transport the said live stock so destined, or to deliver the same to the Southern Railway Company at Louisville, or communicate to the Southern Railway Company the destination thereof, but in all of such cases appellee will only receive, bill, and transport the said live stock, so tendered to it, to Louisville, Ky., and when such consignment reaches the city of Louisville appellee refuses to deliver the same to the Southern Railway Company for delivery at appellant's plant, or to any person thereat, and refuses to give to the connecting common carrier (Southern Railway Company) the instructions of the owner and consignor of such live stock, but in all such instances, over the protest and objection of the owners of such live stock, appellee makes delivery thereof to the Bourbon Stock Yards Company, in Louisville, Ky., a rival and competitor in business of appellant.

Appellee undertakes to justify its conduct in this regard under and by virtue of a contract made by it on the 20th day of September, 1888, with the Bourbon Stock Yards Company, whereby appellee and the said Bourbon

Stock Yards Company agreed and contracted with each other as follows, viz.:

> "4. First party agrees that it will not lease, rent, or sell any of its ground, in the city of Louisville, for the establishment of a stock yard, or otherwise facilitate the establishment of a stock yard in the said city, and it will establish no other stock depot in the said city, and that it will deliver, and cause to be delivered, to the second party, so far as it legally may, all live stock shipped over the roads of the first party and consigned to the city of Louisville, and should any live stock be shipped to other person or persons in said city, the first party hereby makes and agrees to make the stock yards of the second party the stock depot of the first party for said city, and agrees to unload all live stock shipped to said city at the address of the second party, but if the provisions of this section of this contract be abrogated or invalidated by judgment of any court, or by legislative requirement, then the second party shall have no claim to damages arising out of or dependent on said provisions, and the second party shall, at its own cost and expense, defend any and all litigation which may arise out of the provisions of this section, and will hold the first party entirely harmless therefrom." (See Record, pages 6 and 7.)

The bill charges that the acts and conduct of the appellee, as a common carrier of passengers and freight of all kinds and description is unlawful and in disregard of its duties to appellant and the public, and in violation of the constitution and laws of the United States, and particularly of the Act of the Congress of the United States, approved February 4, 1887, and known as "An Act to Regulate Commerce," and especially the third section thereof and the amendments to said Act.

The bill shows the very great injury inflicted upon appellant by the acts and conduct of the appellee; that it has no ample or adequate remedy at law for the injuries to its business, and that if required to institute an action for

damages upon each and every refusal of appellee to receive, bill, transport, transfer, switch, and make delivery of such interstate stock to the Southern Railway Company with the destination thereof made known to such connecting carrier accordingly as directed by the shipper, great delay will be occasioned to the shippers, damage occasioned to the live stock, and damage to appellant from its failure to receive the live stock for care, attention, and feeding; and that the business of appellant, by the continued unlawful conduct of appellee, will be disrupted and totally ruined; and that separate and distinct actions at law will be wholly inadequate to the injury so inflicted.

Appellee filed an amended bill (see Record, pages 11 and 12), alleging:

> "That since the enactment by the Congress of the United States of the act known as 'An Act to Regulate Commerce,' passed February 4, 1887, and amendments thereto, the Commonwealth of Kentucky has, by constitutional provisions and legislative enactments, in aid of commerce, imposed certain duties upon all common carriers, and that by mandatory self-executing constitutional requirements of the Commonwealth of Kentucky all railroad companies organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, or doing a railroad business in this State, are required to receive, transfer, deliver and switch empty or loaded cars, and to move, transport, receive, load or unload all freight in car loads or less quantities coming to or going from any railroad, transfer, belt line, bridge, or siding thereon with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback, or rebate in favor of any person, corporation, consignee or consignor in any matter as to payment, transportation, handling, or delivery, and that all railroad companies doing business in this State shall so receive, deliver, transfer, and transport all freight from any and to any point where there is a physical connection between the tracks of said companies; and further, under the Constitution and laws of the State of Kentucky, it is made unlawful for any railway, transfer, belt line or railway bridge company to make any exclusive

or preferential contract or arrangement with any individual, association, or corporation for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier, and that the acts and conduct of the defendant complained of in its original bill are in violation of the Constitution and laws of the State of Kentucky, and it pleads and relies thereon in aid of the act of Congress of the United States, and known as 'An Act to Regulate Commerce.'"

The third, eighth, and ninth sections of the Act to Regulate Commerce, and the constitutional provisions and legislative enactments in aid thereof, read as follows, viz.:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (See Record, pages 60 and 61.)

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the pro-

visions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

"In any such action brought for the recovery of damages the court before which the same shall be pending, may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Secs. 213 to 217 of the Constitution of Kentucky:

"Sec. 213. *Freight and cars to be handled and transported without discrimination.* All railroad, transfer, belt lines and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines or bridges, or doing a railway business in this State, shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee, or consignor, in any matter as to payment, transportation, handling or delivery;

and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business."

"Sec. 214. *Exclusive or Preferential Contract Forbidden.* No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association, or corporation, for the receipt, transfer, delivery, transportation, handling, care, or custody of any freight, or for the conduct of any business as a common carrier."

"Sec. 215. *Freight to be Transported and Handled for all Persons on Same Terms.* All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver, and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

"Sec. 216. *Tracks of Different Railways may Intersect and Unite.* All railway, transfer, belt lines, and railway bridge companies shall allow the tracks of each other to unite, intersect, and cross at any point where such union, intersection and crossing is reasonable or feasible."

"Sec. 217. *Penalties for Violation of Four Preceding Sections.* Any person, association, or corporation, willfully or knowingly violating any of the provisions of sections two hundred and thirteen, two hundred and fourteen, two hundred and fifteen, or two hundred and sixteen, shall, upon conviction by a court of competent jurisdiction, for the first offense be fined two thousand dollars; for the second offense, five thousand dollars; and for the third offense, shall thereupon, *ipso facto*, forfeit its franchises, privileges or charter rights; and if such delinquent be a foreign corporation, it shall, *ipso facto*, forfeit its right to do business in this State; and the Attorney-General of the Commonwealth, shall, forthwith, upon notice of the violation of any of said provisions, institute proceedings to enforce the provisions of the aforesaid sections."

Sections 818 and 819 of the general laws of Kentucky, of 1894, read:

"818. *Preference or advantage forbidden—rules defining same quantity of freight.* It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. . . .

Sec. 819. *Penalty and damages for extortion, discrimination, preference—jurisdiction—duty of commission—limitation.* Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty, as aforesaid, and the Franklin Circuit Court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the board of railroad commissioners; and such railroad corporation shall also be liable, in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorney's fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the railroad commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

The prayer of the bill and amended bill, in conformity with which a mandatory order of injunction was asked, and upon

which the action was determined, reads as follows (see Record, page 9):

> "That the defendant, the Louisville & Nashville Railroad Company, be, by mandatory order of injunction, immediately ordered and required to receive, bill, transport, transfer, switch and deliver any and all shipments of live stock tendered to it outside of the State of Kentucky, consigned or tendered to be consigned, to any point of physical connection between its said line and the line of the Southern Railway Company in Kentucky, destined to the Central Stock Yards Station, Ky., or to the Central Stock Yards, Ky., or any such live stock consigned to any individual, partnership, firm or corporation at said Central Stock Yards, Ky., or at said Central Stock Yards Station, Ky., or via the Southern Railway Company in Kentucky, *destined* to said yards or station, and that it also be required, whenever so requested by the consignor and consignee or owner of said stock, at any of its stations, to recognize the right of said parties to change the destination of said shipment; and that it be required to change said destination and make delivery thereof at one of the points of physical connection between the tracks of said defendant's line and the tracks of the Southern Railway Company in Kentucky, for delivery by the said Southern Railway Company at the Central Stock Yards Station, Ky., or to whomsoever there consigned."

At the hearing on said motion appellant read its bill of complaint and amended bill of complaint, and the affidavits of the following-named parties and all exhibits therewith, viz.: B. H. Hurt (see Rec., p. 37), T. C. Powell (see Rec., p. 25), S. A. Stalcup (see Rec., p. 23), J. W. Byrne (see Rec., pp. 28 to 33 inclusive), J. E. Miller (see Rec., pp. 33 to 35), W. A. Evans (see Rec., p. 22), and R. C. Watkins (see Rec., pp. 36 and 37), and the blank printed form of a live-stock contract in use by defendant in error (see opposite Rec. p. 58).

The appellee read its answer (see Rec., pp. 44 to 50) as an affidavit, and the affidavits and exhibits therewith of the following-named parties, viz.: Walker D. Hines (see Rec., pp. 12 to 17 and pp. 51 to 56 inclusive), M. H. Smith (see

Rec., p. 56), M. J. Reedy (see Rec., p. 57), and C. R. Brent (see Rec., pp. 57 and 58).

On the 23d day of January, 1902, the trial court delivered a written opinion, in passing upon the motion for an injunction, and overruled the said motion. (See Rec., pp. 59 to 64.)

On the 24th day of January, 1902, the trial court, of its own motion, entered a final decree dismissing the plaintiff in error's bill of complaint, which said decree reads as follows:

> "And on another day of said term of said court, to wit, on the 24th day of January, 1902, came again the parties complainant and defendant by their respective counsel of record, and it now appearing to the court that it has not jurisdiction in equity of the matters alleged in the bill of complaint herein, upon consideration thereof, it is now, therefore, by the court ordered, adjudged, and decreed that the complainant's bill be and it is now dismissed, but without prejudice to the complainant's right to pursue any other remedies it may have upon the matters alleged by it, to all of which the complainant excepts.
>
> "It is further ordered, adjudged and decreed that the defendant have and recover of the complainant its costs herein expended, to be taxed by the clerk, and it may have execution therefor, to all of which the complainant excepts." (See Rec., pp. 64 to 65.)

From this decree an appeal was prayed (see Rec. 65), granted and allowed to the Circuit Court of Appeals for the Sixth Circuit, assigning errors (Rec., 66), and praying for a reversal of the aforesaid judgment of the Circuit Court.

Said appeal having been duly perfected in the United States Circuit Court of Appeals (Rec., 67 to 70) the Court of Appeals thereafter, on the 8th day of July, 1902, rendered an opinion (Rec. 70 to 78) affirming the judgment of the Circuit Court. Afterward, on the 25th day of August, 1902, a petition for a rehearing was duly filed in the said Circuit Court of Appeals (Rec. 78 to 102), in which petition appellant prayed for a rehearing on the ground that the opinion of the Court of Appeals appeared to be based upon a misconception of the

nature of the relief prayed for. This petition was denied on October 7, 1902 (Rec., 102), and later, on the 13th of October, the appellant filed in the United States Circuit Court of Appeals a petition for appeal (Rec. 103). The appeal having been duly perfected (Rec. 105 to 106) an order was entered on October 15, 1902 (Rec. 106), granting an appeal to this court.

Upon this appeal the following errors are assigned:

ASSIGNMENT OF ERRORS.

1. The court erred in holding that under the Interstate Commerce Act, and particularly the third section thereof, the appellee could not be required to receive, bill, transport, transfer, switch, deliver, and interchange interstate live-stock traffic, consigned to appellant, with the Southern Railway Company in Kentucky at points of physical connection between the two lines.

2. The court erred in holding that to require appellant to show the destination of interstate live-stock traffic consigned to appellant in its billing thereof, and to transport, transfer, switch, and deliver the same to appellant via the Southern Railway Company for delivery purposes, would be the judicial making of a joint tariff between the Southern Railway Company and appellee, or any division of through rates.

3. The court erred in holding that the provisions of the Constitution of Kentucky, relied on, are in any respect, in conflict with the Interstate Commerce Act, or in any manner attempted to regulate interstate commerce.

4. The court erred in holding that the State of Kentucky could not, by constitutional requirement or legislative enactment, impose upon common carriers doing business in said State, switching regulations, or that the imposition of such switching regulations interfered with interstate commerce where such traffic had arrived in said State, and is destined to points of delivery within said State.

5. The court erred in holding that as appellee had a live-stock depot in Louisville, it could not be required to deliver to appellant via the Southern Railway Company in Louisville, Ky., at the point of physical connection between the two roads, live stock in car loads coming over its lines destined to the Central Stock Yards, or commission merchants doing *business thereat*, on the line of the Southern Railway Company.

6. The court erred in holding that the service performed by the Southern Railway Company in making delivery of live stock destined to the appellant, and coming to the city of Louisville, Ky., over the lines of appellee, was anything other than a switching movement purely local in its character, or that the same had any relation whatever to any through or interstate rate fixed beforehand.

7. The court erred in holding that the contract of appellee with the Bourbon Stock Yards Company is valid and enforcible as to interstate traffic notwithstanding such traffic may be directed by the shipper to be delivered to appellant or at some other point than the Bourbon Stock Yards.

8. The court erred in affirming the judgment of the United States Circuit Court for the Western District of Kentucky herein.

POINTS AND AUTHORITIES.

I.

The remedies provided in Sections 8 and 9 of the Interstate Commerce Act are in addition *to the remedies existing* at common law, and the bill being predicated also upon the Kentucky constitution and statutes, the Circuit Court has jurisdiction. Any possible doubt on this question is settled by the Elkins Law.

Thompson v. Allen County, 115 U. S. 554;
Boyce v. Grundy, 3 Peters, 215;
Foster's Fed. Prac., Vol. I, page 9.
Little Rock, etc., R. R. Co. v. E. T. R. R. Co., 47 Fed. 772;
Interstate S. Y. Co. v. R. R. Cos., 99 Fed. 483;
U. P. Bk. v. City, 111 Fed. 563;
Davis v. Wakelee, 156 U. S. 681;
Watson v. Sutherland, 5 Wall. 74;
Rathbone v. Warren, 10 Johns, 587;
King v. Baldwin, 17 Johns, 384;
Am. Ins. Co. v. Fisk, 1 Paige, 90;
Teague v. Russell, 2 Stew. (Ala.) 420;
Southampton D. Co. v. S. H. & P. B., L. R. 11 Eq. 254;
Weymouth v. Boyer, 1 Ves. Jr. 416;
Vincent v. C. & A. R. R. Co., 49 Ill. 33;
Toledo, A. A. & N. M. R'y Co. v. Penn. Co., 54 Fed. 730;
Atty.-Gen. v. Mid. Kent. Ky. Co., L. R. 3 Ch. App. 100;
Elkins Act (an Act regulating, etc., approved Feb. 19, 1903);
Missouri Pac. v. U. S., 189 U. S. 274;
U. S. v. Michigan, 122 Fed. 544.

II.

The interest of appellant as consignee and the party injured by the discrimination complained of is sufficient to enable it to maintain the bill.

Record, 9;
Weber v. Gage, 39 N. H. 182;
Story's Eq. Pl., Sec. 730 and authorities;

Elkins Act, Sec. 2;
Interstate S. Y. Co. v. I. U. R'y Co., 99 Fed. 472;
Vincent v. C. & A. R. R. Co., 49 Ill. 33.

III.

No prayer for through billing is contained in the bill: the prayer is that the defendant be compelled to accept any and all stock tendered to it for points of connection with the Southern Railway Company and to deliver the same to the Southern Railway with direction as to its destination, and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock.

C. N. & St. P. R'y Co. v. Becker, 32 Fed. 849;
Iowa v. C. N. & St. P. R'y Co., 33 Fed. 391;
Am. and Eng. Ency. Law, 2d Ed., Vol. 5, p. 166;
Galena & C. U. R. R. Co. v. Rose, 68 Am. Dec. 574;
Am. and Eng. Ency. Law, 1st Ed., Vol. 25, p. 904;
Dorsey v. Cock, 4 Bibb, 45;
Tibbs v. Timberlake, 4 Littell, 16;
Dorsey v. Barbee, Littell's Select. Cases, 205;
Stapp v. Phelps, 7 Dana, 300;
Stanford v. Farmers Bk., 1 Bush, 340;
Mundy v. Kean's Admr., 5 Ky. Law Rep. 697;
Jones v. Strode, 19 Ky. Law Rep. 118.

IV.

Under the common law, the Interstate Commerce Act and the Constitution and statutes of the State of Kentucky, the appellee is required, as a common carrier, to receive, transport, and deliver freight of all kinds and cars of freight tendered by shippers and consignors at any point on its line, and to deliver the same to the Southern Railway Company at its points of connection with the line of the appellee company, in every case where the consignor specifically

orders that freight or cars of freight shall be so delivered to said the Southern Railway Company, and the appellee is required to carry, in accordance with such specific instructions, without discrimination and for reasonable charges.

Sec. 3, Interstate Commerce Act, Vol. 1, 2d Ed. U. S. Supp. 529;
Ky. Constitution, Sec. 213;
Elliott on Railroads, Col. 4, Secs. 1432 and 1440;
North v. Merchants Trans. Co., 146 Mass. 315;
Palmer v. C. etc. R. Co., 56 Conn. 137;
Little Miami R. Co. v. Washburn, 22 Ohio St. 324;
R. R. Co. v. Mfg. Co., 16 Wall. 318;
Myrick v. M. C. R. R. Co., 107 U. S. 106;
Penn. R. R. Co. v. Jones, 155 U. S. 333;
Dana v. N. Y. C. R. R. Co., 50 How. Pr. 428;
Bosworth v. Chicago R'y Co., 87 Fed. 72;
Coe v. L. & N. R. R. Co., 3 Fed. 778;
Vincent v. C. & A. R. R. Co., 49 Ill. 41;
In Re Peterson, 21 Fed. 889;
M. S. & I. R. Co. v. Day, 20 Ill. 375;
Beers v. Wabash, etc., R'y Co., 34 Fed. 244;
Forsyth v. Walker, 9 Pa. St. 148;
L. & N. R. R. Co. v. Odill, 33 S. W. 611 (Sup. Ct. Tenn.)
Johnson v. N. Y. C. R'y Co., 33 N. Y. 610;
McDonald v. W. R. R. Co., 34 N. Y. 497;
Hewett v. C. B. & Q. R'y Co., 63 Ia. 611;
C. B. & Q. R'y Co. v. B. C. R. & N. R'y Co., 34 Fed. 481;
Inman v. St. L. S. W. R. Co., 37 S. W. 37 (Tex.);
Dinsmore v. L. C. & L. R'y Co., Flippin, 672 (C. Ct. Tenn.);
McCoy v. C. I. St. L. & C. R'y Co., 13 Fed. 3;
Mo. Pac. R'y Co. v. W. W. G. Co., 40 Pac. 899 (Kas.);
Peoria & P. U. R'y Co. v. R. R. Co., 109 Ill. 135;
L. & N. R. R. Co. v. Williams, 95 Ky. 199;
Jacobson v. W. M. & P. R. R. Co., 179 U. S. 287;
B. C. R. & N. R'y Co. v. Day, 82 Ia. 312;
M. C. R. R. Co. v. Smithson, 45 Mich. 212;
C. G. W. R'y Co. v. Armstrong, 62 Ill. App. 228;
Worcester v. Norwich & W. R. Co., 109 Mass. 112;
People v. Duchess & C. R. Co., 58 N. Y. 152;
People v. Boston & A. R. R. Co., 70 N. Y. 569;
People v. N. Y. L. E. & A. R. Co., 104 N. Y. 58.

V.

The duty of the appellee as a common carrier is not discharged until it delivers the freight or car of freight to the point of specified connection and furnishes to the agent of such known specified connection the instructions of the consignor or shipper as to the further carriage or delivery of the freight or car of freight.

Bosworth v. C. etc. R'y Co., 87 Fed. 72;
R. R. Co. v. Mfg. Co., 16 Wall. 318;
Vincent v. C. & A. R. R. Co., 49 Ill. 41;
Coe v. L. & N. R. R. Co., 3 Fed. 778;
Selma & Meridian R. R. Co. v. Butts, 43 Ala. 385;
Little Miami R. R. Co. v. Washburn, 22 Ohio St. 324;
Colfax Mt. & F. Co. v. S. P. R'y Co., 46 Pac. 668;
Dana v. N. Y. C. & H. R. R. Co., 50 How. Pr. 425;
McDonald v. Western R. Co., 34 N. Y. 497;
Hewett v. R. Co., 63 Ia. 611.

VI.

The provisions of the Kentucky Constitution and statutes not being in conflict with the Interstate Commerce Act are in the nature of reasonable regulations in aid thereof, and will be enforced by the Federal courts.

Munn v. Ill., 94 U. S. 125;
Sanford v. R. R. Co., 24 Pa. St. 378;
Chicago, etc., R'y Co. v. Becker, 32 Fed. 349;
State v. Chicago, etc., R'y Co., 33 Fed. 391;
Jacobson v. W. M. & P. R. R. Co., 179 U. S. 297;
B. C. R. & N. R. R. Co. v. Dey, 82 Ia. 312;
P. & P. Q. R. Co. v. C. R. I. & P. Co., 109 Ill. 135;
M. C. R. R. Co. v. Smithson, 45 Mich. 212;
Inman v. St. L. S. W. R. Co., 37 S. W. 37;
L. & N. R. R. Co. v. Williams, 95 Ky. 199;
W. U. Tel. Co. v. James, 162 U. S. 650;
L. S. & M. S. R'y Co. v. Ohio, 173 U. S. 285;
Smith v. Alabama, 124 U. S. 465;

Sherlock v. Alling, 93 U. S. 99;
State Tax on Railway Receipts, 15 Wall. 284;
Mobile Co. v. Kimball, 102 U. S. 691;
Bagg v. Railroad, 109 N. C. 279;
W. U. Tel. Co. v. Howell, 95 Ga. 194;
Same v. Bright, 90 Va. 778;
Morgan S. S. Co. v. La., 118 U. S. 455;
Train v. B. D. Co., 144 Mass. 523;
Wilton v. Missouri, 91 U. S. 275;
R. R. Co. v. Fuller, 17 Wall. 560;
Atchison, etc., R'y Co. v. Denver R. R. Co., 110 U. S. 667;
People v. B. & A. R. R. Co., 70 N. Y. 569;
People v. R. R. Co., 104 N. Y. 58;
Olcott v. Supervisors, 16 Wall. 678;
Cherokee v. S. K. R'y Co., 135 U. S. 641;
U. S. v. J. T. Ass'n, 171 U. S. 505;
Commonwealth v. Alger, 7 Cushing, 53;
Cooley's Cont. Lim. (6 ed.), p. 715;
L. & N. R. R. Co. v. Kentucky, 161 U. S. 701;
Plumby v. Mass., 155 U. S. 462;
R. & A. R. R. Co. v. Tobacco Co., 169 U. S. 311;
C. M. & St. P. R'y Co. v. Solan, 169 U. S. 133;
L. & N. R. R. Co. v. Coal Co., 23 Ky. Law Rep. 118;
L. & N. R. R. Co. v. Ky., 183 U. S. 503;
Penn. R. R. Co. v. Miller, 132 U. S. 75;
L. W. Co. v. Clark, 143 U. S. 1;
N. Y. L. E. & W. R. R. Co. v. Penn, 158 U. S. 431;
Bridge Co. v. Ky., 166 U. S. 150;
M. & St. L. R. R. Co. v. Minn., 186 U. S. 257;
N. Ch. & St. L. R. Co. v. Ala., 128 U. S. 96.

VII.

The contract of the appellee with the Bourbon Company to deliver to it all live stock brought by the defendant to the city of Louisville is contrary to public policy and void, and its operation should be prevented by the courts.

McCoy v. C. I. St. L. & C. R. Co., 13 Fed. 3;
L. E. & St. L. Consol. R'y Co. v. Wilson, 18 L. R. A. 105;
P. & R. I. Co. v. C. V. M. Co., 68 Ill. 489;
Inter-Ocean v. Associated Press, 184 Ill. 438;
C. & N. W. R'y Co. v. People, 56 Ill. 365;
Gaston v. B. & E. R. R. Co., 95 Eng. Com. Law, 641;

Sandford v. R. R. Co., 24 Penn. St. 382;
Rogers L. Co. v. Erie R. R. Co., 5 Green, 380;
State v. H. & N. R. R. Co., 29 Conn. 538;
Doolen v. Ward, 6 Johns, 194;
Hooker v. Vandewater, 4 Denio, 349;
Stanton v. Allen, 5 Denio, 434;
State v. H. & N. R. R. Co., 29 Conn. 538;
Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 502;
Bennett v. Dutton, 10 N. H. 481;
Anderson v. Jett, 89 Ky. 375;
Pueblo, etc., R. R. Co. v. Taylor, 6 Colo. 1;
St. J. & D. R. R. Co. v. Ryan, 11 Kan. 608;
Coe v. L. & N. R. R. Co., 3 Fed. 778;
Interstate S. Y. Co. v. Ind. U. R'y Co., 99 Fed. 472;
R'y Co. v. Dohn, 53 N. E. 937;
Parkinson v. R'y Co., L. R. 6 C. P. 544;
Ilwaco R'y Co. & Nav. Co. v. Oregon R. Co., 57 Fed. 673;
C. M. & St. P. R. R. Co. v. Wab. R'y Co., 61 Fed. 993 (and cases cited).
Gibbs v. Consol. Gas Co., 130 U. S. 396;
Thomas v. W. J. R. Co., 101 U. S. 71;
U. S. v. J. T. Assn., 171 U. S. 505.

I.

The remedies provided in Secs. 8 and 9 of the Interstate Commerce Act are in addition to the remedies existing at common law, and the bill being predicated also upon the Kentucky Constitution and statutes, the Circuit Court has jurisdiction. Any possible doubt on this question is settled by the Elkins Law.

The trial court held that by and under Secs. 8 and 9 of the Interstate Commerce Act (hereinbefore copied on pages 9 and 10) the remedy for violation of Sec. 3 of that Act is limited to an action for damages sustained in consequence of any such violation, with reasonable counsel fees to be fixed by the court, or of making complaint to the Interstate Commerce Commission for relief, and reliance upon said Commission to compel, through the courts, obedience to any order or orders it may make.

The principal question thus brought to our attention by the decision of the trial court therefore is: Whether or not the remedies provided for in Secs. 8 and 9 of said Act are exclusive of all other remedies.

We think it entirely clear from the authorities, and from the Act to Regulate Commerce itself, that all of the remedies afforded by law against common carriers are not embodied in the said Act to Regulate Commerce.

We find that in Section 22 of the said Act to Regulate Commerce, as amended March 2, 1889, and February 8, 1895, among other things it is provided:

> "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies; provided, that no pending litigation shall in any way be affected by this Act."

From an examination of the opinion of the trial court (see Rec., pages 59–64) it will be seen that the same is largely based upon the last few sentences of the opinion of this court in the case of Haycraft v. United States, 22 Wall. 98, reading as follows:

> "But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand, a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided, and consequently he is now without any. That remedy was the only one of which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

That case was under the Captured and Abandoned Property Act of March 12, 1863, which said statute bears no analogy to the Interstate Commerce Act. That statute was distinctly a war measure, requiring the consent of the Government that it be sued, and the only action consented to under the said Act was one to be commenced within two years after the suppression of the rebellion. There was for the parties to be benefited by the Act in that case absolutely no right or remedy excepting such as was given by the said Act, and if a grant from Congress of the right and remedy was a condition precedent to the assertion thereof, certainly Congress had the right to prescribe limitations and restrictions upon such a right so granted, and this is all that was decided by that case.

The case of Farmers and Mechanics National Bank v. Dearing, 91 U. S. 29, relied upon by the trial court, was and is a case wherein the bank, with its *situs* in Buffalo, N. Y., charged Dearing 10 per cent on a certain loan, which was usurious under the laws of New York, and the penalty pro-

vided therefor under the laws of New York was a forfeiture of the principal and interest, whereas under the act of Congress commonly known as the "National Banking Act," under which the bank in that case was organized, provided that for a charge of a usurious rate of interest the bank should forfeit the interest, with the right in the parties aggrieved to recover back twice the amount wrongfully paid, provided suit be brought within two years from the time the usurious transaction occurred. In the State courts of New York, wherein suit was brought, the State statute referred to was held valid and judgment rendered accordingly, and upon an appeal to this court it was held that State usury laws can not operate to cause a loss of entire debt due a national bank, or in other words, that State usury statutes are not applicable to paper discounted by national banks.

The case of Barnett v. National Bank, 98 U. S. 555, cited and relied upon by the trial court in support of its conclusion, is a case in which it was held that the Act of June 3, 1864, commonly known as the "National Banking Act," having prescribed the penalty for the taking of usury by a national bank, the remedy to the party aggrieved was confined to that act, and was and is exclusive.

Precisely the same question was decided in the case of Carter v. Carusi, 112 U. S. 478, cited and relied upon in support of the trial court's conclusion, the same differing only in that the Act in that case was the unlawful charge of interest under an Act of Congress for the District of Columbia.

To the same effect will be found the case of McBroom v. Scottish Investment Company, 153 U. S. 318, cited and relied on by the trial court in support of its conclusion.

The case of E. Tenn., Virginia & Georgia R. R. Co. v. Sou. Tel. Co., 112 U. S. 106 (erroneously cited by the trial court as being 122 U. S. 306), does not in the slightest extent, as we understand the case, support the reasoning or conclusion of the trial court. That case decides that a Federal court, with

jurisdiction over the parties, can award a right given solely by a State statute, but that in such a proceeding the Federal court can act only in accordance with the State statute creating the remedy, and for such purpose is only possessed of the powers conferred upon the State court.

This case supports our contention, and shows that the trial court had jurisdiction in equity of the matters alleged in the bill and amended bill of complaint, as confessedly the said court had jurisdiction over the parties by reason of the diversity of citizenship.

The allegations of the bill and amended bill of complaint, and the uncontradicted evidence in support thereof, as shown from the affidavits, particularly of J. W. Byrne and J. E. Miller (Rec., 28 to 35), show that the wrongs complained of to appellant, and to all persons and the public generally, desiring to do business at the yards of appellant, is of a continuous character; that said damage therefrom is not susceptible of actual pecuniary estimation; that actions at law would involve a multiplicity of suits, none of which would or could end the litigation, and these facts being conceded it necessarily results therefrom, as charged and proven, that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity.

This court, in the case of Thompson v. Allen County, 115 U. S. 554, in an opinion by Justice Miller, defined the legal meaning of inadequacy of the remedy at law, saying:

> "By inadequacy of the remedy at law is here meant, not that it fails to produce the money—that is a very usual result in the use of all remedies—but that in its nature or character it is not fitted or adapted to the end in view."

In Boyce v. Grundy, 3 Peters, 215, it is said:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

See also Foster's Federal Practice, vol. 1, p. 9.

It will be observed from the trial court's opinion that the court conceded that the cases of Little Rock, etc., R. R. Co., v. E. Tenn. R. R. Co., 47 Fed. 772, and Interstate Stock Yards Company v. Railroad Companies, 99 Fed. 483, are against the conclusion reached in said opinion, but the failure to consider those cases was attempted to be justified on the idea that to the extent that Judge Hammond expressed his opinion contrary to that of the trial court such expression was mere dicta, and that in the Interstate Stock Yards Company case the want of power or jurisdiction in the Federal court to grant the relief was not raised, by demurrer or otherwise.

It is likewise true that no demurrer was filed to the bill and amended bill of complaint herein, though before the hearing the trial court furnished counsel for appellee with the authorities upon which his opinion is made to rest, with the suggestion that the question of power was initiatory in its character and raised itself in courts of the United States.

Learned counsel for appellee did not regard the authorities relied on by the trial court sufficiently pertinent to even fall in line and file a demurrer. While we have no complaint of the trial court's action, if right in its result, yet we believe that the conclusion so reached by the said court is adverse to all the elementary text-books, adjudicated cases, and the Act to Regulate Commerce itself.

This court, in the very recent case of Union Planters Bank v. City of Memphis, 111 Fed. 563, in an opinion by Judge Lurton, held that where complainant will be subjected to irreparable damage, or to a necessity of a multiplicity of suits, if compelled to rely upon his legal remedy alone, equity will interpose upon the ground of the inadequacy of the remedy at law. (Collating the authorities in support thereof.)

Judge Hammond, in the case of Little Rock, etc., R. R. Co. v. E. Tenn., etc., R. R. Co., 47 Fed. 774, in discussing the equity jurisdiction of the Federal court, concluded that

said court had such jurisdiction, notwithstanding the provisions of the Interstate Commerce Act prescribed certain remedies, and in doing so said:

> "There can be but little doubt that the plenary jurisdiction of this court to entertain all controversies arising under an Act of Congress, either at law or equity, has not been abbreviated by this Act in relation to controversies arising under it, but the special remedies, so far as they are special, are merely supplementary to the ordinary remedies existing under the subsisting judiciary act, which governs all our jurisdiction."

It seems to us that the conclusion of Judge Hammond, instead of being dicta, is in effect only adjudicating what the Act itself provides in the twenty-second section thereof, that

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

See especially Johnston v. Louisville, 11 Bush, 533.

We find in the case of Interstate Stock Yards Co. v. Railroad Companies, 99 Fed. 483, that Judge Baker has expressed the law sustaining jurisdiction in a case almost on all fours in its facts with the one under consideration with remarkable clearness, wherein he said:

> "The nature of the wrong complained of, the fact that it is of a continuing character, that it is not susceptible of accurate pecuniary estimation, and that resort to actions at law would involve a multiplicity of suits, none of which would end the litigation, all tend to make it manifest that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity. The jurisdiction in equity does not depend upon the fact that there is no remedy at law. It is afforded whenever the remedy at law is not as full, adequate, and complete as in a court of equity. The rule that equitable relief will not be granted until the complainant's right or title in respect of the subject-matter has been established in an action at law, does

not apply where the subject-matter of the litigation is to prevent discrimination in violation of the Interstate Commerce Act."

In the case of Davis v. Wakelee, 156 U. S. 681, it was stated by the court (page 688):

> "It is a settled principle of equity jurisprudence that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit. Boyce v. Grundy, 28 U. S. 3 Pet. 210 (7:655); Watson v. Sutherland, 72 U. S. 5 Wall. 74, 79 (18:580, 582); Rathbone v. Warren, 10 Johns, 587; King v. Baldwin, 17 Johns, 384, 8 Am. Dec. 415; American Ins. Co. v. Fisk, 1 Page, 90; Teague v. Russell, 2 Stew. (Ala.) 457; Southampton Dock Co. v. Southampton Harbor Board, L. R. 11 eq. 254; Weymouth v. Boyer, 1 Ves. Jr. 416. Where equity can give relief plaintiff ought not be compelled to speculate upon the chance of his obtaining relief at law."

The case of Vincent et al. v. C. & A. R. R. Co., 49 Ill. 33, is, without doubt, one of the leading cases on carriers, and has always been quoted with approval. In this case, on the subject of the remedies, the court says (page 43):

> "But it is contended, finally, that even admitting the complainants have been wronged by the appellee, their only remedy is by action for the two months' storage and damages authorized by the statute. Various authorities are cited for the purpose of showing that where a new right has been created, and an adequate remedy for its invasion provided by the same statute, parties injured are confined to the statutory redress. This is doubtless true; but in this case the right is not new, nor is the remedy adequate. A new and enlarged remedy is given, but the right of the consignee to deliver is as old as the common law. The right, in this case, to resort to the restraining powers of a court of chancery, springs from the fact that the course pursued by the company will destroy or greatly injure the business of the appellants. This is evident, for if the tax of ($5.00) five dollars per car is charged by them to their correspondents, they would soon cease to receive shipments of grain, and if paid by

themselves, they would be placed at a ruinous disadvantage in comparison with their rivals in business. For such injuries the damages in a suit at law could furnish no just compensation, and therefore chancery will interfere. Webber v. Gage, 39 N. H. 182, and Watson v. Sunderland, 5 Wallace, 74, are authorities in point. A system of jurisprudence would be radically defective that could not interpose to prevent wrongs of this character, incapable, from their nature, of being redressed by damages."

As early as the case of Watson v. Sunderland, 5 Wallace, 74, the theory of the jurisdiction of the courts of equity in the absence of an adequate remedy at law was clearly laid down; in that case, Judge Davis said (page 79):

"The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleading."

One of the clearest cases on the question of the exclusiveness of the remedies provided under the Interstate Commerce Act is the case of Toledo, A. A. & N. M. R'y Co. v. Penn. Co., 54 Fed. 730; in that case the precise question was raised and passed upon that was raised by the trial court in this cause. In the opinion by Taft, Circuit Judge, page 732, it states:

"It is immaterial what rights the complainant would have had before the passage of the Interstate Commerce Law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

Page 741: "Now the normal condition—the status quo—between connecting common carriers under the Interstate Commerce Law is a continuous passage of freight backward and forward between them, which each

carrier has a right to enjoy, without interruption, exactly as riparian owners have a right to the continuous flow of the stream without obstruction. Since Lord Thurlow's time, the preliminary mandatory injunction has been used to remove obstructions and keep clear the stream. Robinson v. Lord Byron, Brown Ch. 588; Lave v. Newdigale, 10 Ves. 192. So an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this. The Interstate Commerce Law recognizes the necessity for such a remedy, for in summary equity proceedings at the instance of Interstate Commerce Commission, provided by Section 16, as amended in 1889, express power to issue injunctions, mandatory or otherwise, to prevent violation of the orders of the commission, is given to circuit courts. In addition to that, a remedy by mandamus in the district and circuit courts is given to an interested person to compel compliance by the common carrier with the provisions of the act. As this latter proceeding is denominated 'cumulative' in the statute, it does not prevent the remedy by injunction, nor would it, in any event, because the inadequacy of the legal remedy which justifies equitable intervention by injunction is only the inadequacy of the recovery in damages by action at law. Attorney-General v. Mid. Kent R'y Co., L. R. 3 Ch. App. 100."

It will be observed from above quotation that the court not only held that the remedies provided in the Interstate Commerce Act were not to be regarded as exclusive of all other remedies, but that it makes clear that in a case of this kind a mandatory injunction should be granted even under the Interstate Commerce law. The cases of

In re Debs, 158 U. S. 599, and
Chicago, B. & Q. R'y Co. v. Burlington, C. R. & N. R'y Co., 34 Fed. 481,

all sustain our contention, and show that the circuit courts of the United States have jurisdiction of a bill in equity not only to restrain violations of the Interstate Commerce law to the

irreparable injury of appellant, but that the duty imposed by the said Interstate Commerce Act and the State laws of Kentucky on common carriers that they shall receive from connecting roads freight in car load quantities or less are duties which the Federal courts can and should enforce by mandatory injunction, where, as in this case, the injury resulting from the non-performance of such duties is continuing and irreparable.

The Elkins Act.

We have devoted considerable space and attention to the question of the exclusiveness of the remedies provided in the Interstate Commerce Act, owing to the fact that the opinion of the trial court is almost entirely taken up with the discussion of this question. We can not but feel, however, that in the words of Judge Grosscup:

"The Elkins Act makes this discussion largely academic."

In our opinion, and we believe in the opinion of this honorable court, whatever question there might have been about the original jurisdiction of the circuit courts in actions of this kind has been entirely settled by the so-called Elkins Act (an act regulating commerce with foreign nations and among the States, approved February 19, 1903).

The jurisdiction conferred by the Elkins Act may be found from the following language:

Clause from Section 1: "Every violation of this section shall be prosecuted in the court of the United States having jurisdiction of crimes within the district in which such violation is committed or through which the transportation may have been conducted."

Clause from Section 2: "That in any proceedings where the enforcement of the provisions of the statute relating to the Interstate Commerce, whether such proceedings are instituted before the Interstate Commerce Commission or *be taken originally in any circuit court of the*

United States, it should be lawful to include as parties, etc., . . ." (Our italics.)

Clause from Section 3: ". . . and the proceedings provided for by this Act shall not preclude the beginning of suit for the recovery of damages by any party injured, *or any other action* provided by said Act approved February 4th, etc., . . ." (Our italics.)

Thus by the use of the disjunctive "or" in this last quotation it was the manifest intention of Congress to authorize the institution of a suit by any person aggrieved to recover any damages provided for in the Elkins bill, which "*should not preclude*" the institution of any other action provided in any other act not repealed by the Elkins bill.

This Act has been very recently interpreted by this Honorable Court, in the case of the *Missouri Pacific Railway* v. United States (189 U. S., page 274). In this decision it is said by Mr. Justice White, on page 283:

"Although by the fourth section of the act conflicting laws are repealed, it is provided 'but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law *and as modified by the provisions of this act.*' We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the act to regulate commerce. In the nature of things it can not be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course, the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these conditions we think the ends of justice will best be served by reversing the decrees below and remanding the cause to the Circuit Court for such further proceedings as may be consistent with the act to regulate commerce as originally enacted and as subsequently amended, especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to."

Our understanding of this decision is, that the Elkins Act, being entirely remedial, applies to every violation of the Interstate Commerce law, irrespective of whether it transpired previously or subsequent to the passage of that act, and to every case in which such violation was at issue, pending at the time the act was passed. In this understanding, we believe that we are supported by the opinion of the *United States* v. *Michigan*, reported in the 122 Fed. at page 546. In this case the court says, in referring to the case of the *Missouri Pacific* v. the United States:

> "However, the Elkins Act makes this discussion largely academic. It is provided in terms, in that act, that the equity jurisdiction of the United States courts shall be extended to cover just such cases as this, and that suits may be brought by the Government at the instance of the Attorney-General. The only question left is, whether the act is applicable to a case the substantial facts of which transpired before its passage. The Elkins Act is remedial only. It extends the equitable jurisdiction of the court, not to every violation of the Interstate Commerce Law thereafter transpiring, but to every violation, irrespective of whether it transpired previously or subsequently. Such is the construction put upon it by the Supreme Court in the Kansas case referred to."

Under these two last decisions, therefore, we can not but feel that every question as to the jurisdiction of the Circuit Court in this case has been conclusively settled, and that without doubt the Circuit Court had original jurisdiction to entertain the action in the form as brought.

II.

The interest of appellant as consignee and the party injured by the discrimination complained of is sufficient to enable it to maintain the bill.

Considerable attention and space were devoted by counsel for appellee in the Court of Appeals to the argument that complainant is not the party in interest. Neither the trial court nor the Circuit Court of Appeals thought this question of sufficient importance to be worthy of any attention in their consideration of the case. On this point we are inclined to agree with both these courts.

The facts set out in the bill show that the complainant is the owner and maintains a very complete and extensive plant for the receipt, care, and distribution of live stock; that there are situated at this plant, numbers of commission merchants, to whom stock is consigned by various shippers throughout the country. It further appears that the complainant is paid its reasonable charges for the use of its yards and plant and for the services of its employes, and that unless the defendant is restrained and prevented from further failing, neglecting, and refusing to receive, bill, transport, transfer, switch, or deliver live stock destined for the Central Stock Yards, great and irreparable injury and damage will be caused the complainant and its business, resulting in its disruption and destruction. (Rec., p. 8.)

It further appears (Rec., p. 9) that complainant prays for a mandatory order of injunction compelling the defendant to receive, bill, deliver, etc., any and all shipments of live stock tendered to it outside of the State of Kentucky "consigned or tendered to be consigned to any point of physical connection between its said line and the line of the Southern Railway Company in Kentucky, destined to the Central Stock Yards Station, Kentucky, or to the Central Stock Yards, Kentucky,

or any such live stock consigned to any individual, partnership, firm or corporation at said Central Stock Yards, Kentucky, or at said Central Stock Yards Station, Kentucky, or via the Southern Railway Company in Kentucky, destined to said yards or station." (Rec., p. 9.)

In our conception it would be hard to state a case of facts in which the interest of the complainant would appear more clearly than in the facts set out in the bill. The amount of damage already done is, moreover, clearly alleged in figures (Rec. 9), and it is hard to believe that any one reading the facts as set forth in said bill would have any doubt as to the interest of the complainant in the questions at issue or the damage, past and future, which would result to the complainant from the alleged discrimination.

It seems almost unnecessary to cite authorities where the facts speak for themselves.

As stated by Judge Fowler in the case of *Webber* v. *Gage*, 39 N. H. 182 (on page 185):

> "It is not essential that the title of the complainant to the subject-matter of the bill should be directly and explicitly averred; it is sufficient, if facts are stated from which the court may infer a title." (Story's Eq. Pl., Sec. 730 and authorities.)

We might go on and cite many cases, which we shall cite later in our brief, in which the complainant under a condition of facts and averment of interest very similar to that set up in the bill herein has obtained the relief prayed for without the court's questioning or doubting its interest therein.

As stated in the Elkins Act heretofore referred to, Sec. 2, we believe that the law has always been that it is proper and lawful in any proceedings of this kind "to include as parties, in addition to the carrier, all persons interested or affected by the rate, regulation or practice under consideration."

In the case of *Interstate Stock Yards Co.* v. *Indiana Union Railway Company*, 99 Fed. 472, it was said, on page 483:

> "It (the compt.) simply asks that live stock consigned to it, or to persons doing business in its yards, or contracted in the bill of lading to be unloaded, fed, watered, and rested there, shall be delivered in accordance with the contract."

Similarly, in the case of *Vincent* v. *C. & A. R. R. Co.*, 49 Ill. 33, relief was granted to the complainant without any clearer or more distinct allegation of interest than that contained in the bill herein.

From the attitude of both courts below, however, we can not but feel we are justified in practically ignoring this point since, in our conception, the interest of the complainant as set forth in the bill is clear enough to convince even the veriest layman. Moreover, the defendant having answered and not demurred, we consider the point as conclusively waived and conceded.

III.

No prayer for through billing is contained in the bill; the prayer is that the defendant be compelled to accept any and all stock tendered to it for points of connection with the Southern Railway Company and to deliver the same to the Southern Railway with direction as to its destination, and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock.

As set forth in the petition for rehearing, in our opinion the Court of Appeals misconceived the nature and scope of the relief sought by the complainant.

In the opinion rendered by that court (Rec. 86), it is said:

> "It is averred in the bill that the Southern Railway Company has notified the respondent that it would be and now is willing to be responsible from points of physical connection with the Louisville & Nashville Railroad for the delivery of such live stock and the collection of all charges on the same, and would promptly return to all points of connection all empty cars, and would account for all freight charges collected in the usual way. This may be true, and would possibly be a reasonable arrangement. But have the courts the right, in the absence of statute, to dictate to carriers the contract they shall make in the interchange of traffic, and to require such to be carried out as the courts deem reasonable? The billing and transfer of freight from outside points over the two railroads is a matter of arrangement between them. The proportion of the joint tariff each shall receive, the handling of cars, the liability of one to the other, and other matters are to be determined by the contract between the parties. Each controls its own railroad and may determine for itself upon what terms it will unite in a joint tariff. No arrangement exists with the Southern Railroad for the transportation and delivery of cars of live stock to the Central Stock Yards, if that can be assumed to be a station on the line of the Southern Railroad, nor do we think a court of equity has the power to make one and

supervise its execution, nor has this right been conferred upon the courts by the Interstate Commerce Act. This doctrine is so thoroughly established as to require no more than the citation of the authorities in support of it :

A. T. & S. R. R. v. D. N. O. R. R., 110 U. S. 667;
Express cases, 117 U. S. 1;
Pullman Palace Car Co. v. Missouri Pac. R'y Co., 115 U. S. 587;
N. Pac. R. R. v. Dustin, 142 U. S. 492;
Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 567;
L. & N. R. R. Co. v. St. L. M. R. R., 41 Fed. 559;
Oregon Shortline Co. v. N. P. R. R., 51 Fed. 475;
St. L. Drayage Co. v. L. & N. R. R., 65 Fed. 39;
Allen & Lewis v. Oregon R. and Nav. Co., 98 Fed. 16."

It is respectfully submitted that in this conclusion the court was incorrect, because while it is alleged in the bill that the Southern Railway Company had notified the Louisville & Nashville Railroad Company that it would receive at such points of physical connection and be responsible for return of freight and immediately return all empties, it does not necessarily follow from the making of this offer by the Southern Railway that in order to grant the relief sought herein by complainant, the court should determine that such Louisville & Nashville Railroad Company should accept such proposition, although the facts in the case as shown clearly establishes that such arrangements had been entered into and carried into execution between said roads relating to all freight shipments, except such as were designated to this Central Stock Yards.

In the record of this case (between pages 58 and 59) is attached the Louisville & Nashville Railroad Company contract for the transportation of live stock over its lines, being such a contract as was suggested to the court upon the hearing should be entered into by the Louisville & Nashville Railroad as to shipments of live stock tendered it, destined to the Central Stock Yards, and by the very terms of said contract, Section 1, it is provided that the shipper releases the common

carrier from all liability, etc., if the shipment is destined to a point beyond said carrier's lines when the delivery is made to the connecting carrier.

It thus clearly appears that no interchange of JOINT TRAFFIC between these two roads is asked of the court, nor any THROUGH BILLING, nor is it sought to compel the Louisville & Nashville Railroad TO CARRY EXCEPT ON ITS OWN LINES. This court is simply asked to compel the Louisville & Nashville Railroad Company, as it is its duty to do, to receive shipments from owners and consignors of live stock, and to show upon said bill of lading, as in its live stock contract filed, THE DESTINATION OF SAID SHIPMENT, and to deliver same to the connecting carrier, as both at common law and statute it was and is its duty to do, and if such requirements are made by the court the initial carrier's responsibility would cease upon the delivery to the connecting carrier.

The authorities cited by the Court of Appeals may sustain the said statement made in the opinion, but it is respectfully submitted that in the case at issue this state of facts do not exist, as this bill does not seek to compel the defendants to enter into any JOINT TRAFFIC ARRANGEMENT OR THROUGH BILLING. By the terms of the live stock contract of the Louisville & Nashville Railroad filed, which is the usual and customary contract entered into by all roads, it is shown that the initial carrier's responsibility ceases whenever it delivers to the connecting carrier; and the law requires him to also deliver to such connecting carrier on the delivery of such freight the instructions of the shipper as to destination, and the contract filed shows a blank left to indicate the destination.

The bill in this case, briefly stated, simply asks that the defendant be compelled to receive, ship, transport, switch, and deliver TO THE CONNECTING CARRIER, and while it is stated in the body of said bill that the Southern Railway Company had agreed to be responsible for the collection of freights, etc., it is not asked that the mandatory injunction prayed for, require

defendant to ship under said arrangement with the Southern as to the said freight, but simply that it be required to receive and deliver, which necessarily means in the usual way and under the usual terms and conditions, but even had the bill asked that defendant be required to enter into this agreement with the Southern as to freight, still, although it might not be entitled to this requirement, if it shows upon its face that the defendant is violating a plain, legal duty, regardless of this allegation as to freights, the plaintiff is entitled to redress to the extent that it is necessary to be given to remedy the wrong and injury suffered. This allegation as to freight certainly can not deprive plaintiff of its legal rights, if they are shown to exist, although said freight arrangement may not be one of the elements of said right. It will not be deprived of what it is entitled to because it asks more.

The case presented as to the proposition of defendant's rights as to freights shows the following state of facts and law:

By the affidavit of T. C. Powell (Record, pages 25 to 28), the physical connection between these two roads is shown to exist, and that the movement required for delivery of cars from one road to the other is simply a *switching movement* and made within the switching limits of the city of Louisville, for which a fixed price of $2.00 is established, and can not be changed or varied by the initial carrier, and that therefore this charge can not and does not enter or become a part of the freight charge for the haul by the Louisville & Nashville Railroad from the point where said freight is received to the city of Louisville, and that therefore it is not and can not be a subject of through billing or traffic contract entered into by the two roads.

The court's attention is respectfully called to the case of Chicago N. & St. P. R'y Co. v. Becker and others, 32 Federal Reporter, page 849, as fully sustaining this last contention as to the switching movement.

Also to the State of Iowa v. Chicago, N. & St. P. R'y Co., 33 Federal Reporter, page 391.

It is thought that these cases are conclusive of this question.

As stated, the court is asked to require the defendant to receive and deliver to the connecting carrier. If the court grants such relief, it would certainly do so REQUIRING DEFENDANT TO RECEIVE AND DELIVER UNDER THE USUAL CUSTOM, TERMS, AND CONDITIONS, AND IN CONFORMITY TO THE LAW GOVERNING THE QUESTION OF FREIGHTS, and nothing more is asked or intended to be asked by said bill. If this be a correct statement of the law, as it is thought to be, then the question of the collection of freights from the point of reception to the point of delivery by the initial carrier is a matter dependent upon the wishes and demands of the said initial carrier, as in law he has the right to demand PREPAYMENT of such freights before any transportation of or delivery to the connecting carrier.

In the 2d edition of the the American and English Encyclopedia of Law, vol. 5, page 166, it is said:

> "Upon a demand therefor, by the carrier, a shipper is bound to prepay all freight charges on goods tendered for transportation,"

and a number of authorities are cited thereunder.

In Galena & Chicago U. R. R. Company v. Rose, 68th American Decisions, page 574 (quoting from the syllabus), it is said:

> "A railroad company may demand prepayment of freight charges, but in omitting such demands the company becomes bound to transport the freight according to its custom, and slight evidence of willingness to pay will be sufficient to support an action for damages caused by refusal to receive such freight."

Again it is said, in the American and English Encyclopedia of Law, 1st Edition, vol. 25, page 904:

> "The actual production of the money is not required where the party is ready and willing to pay it, but is pre-

vented by the creditor declaring that he will not receive it, or by his making any declaration equivalent to a refusal to accept it if tendered."

See cases cited in note thereunder as follows:

Dorsey v. Cock, 4 Bibb, 45;
Tibbs v. Timberlake, 4 Littell, 16;
Dorsey v. Barbee, Littell's Select. Cases, 205;
Stapp v. Phelps, 7th Dana, 301;
Sanford v. Farmers Bank, 1st Bush, 340;
Mundy v. Kaan's Admr., 5th Ky. Law Reporter, 697;
Jones v. Strode, 19th Ky. Law Reporter, 118.

Neither the bill in this case nor the answer shows that any prepayment of freight was demanded by the defendant of the shippers, but, on the contrary, said bill shows that defendant not only refused to receive such shipments destined to the Central Stock Yards, or to indicate said destination upon the contract of shipment, but that it issued its circular letter to all of its agents along its routes directing them not to receive such shipments, thereby making a tender of freight charges unnecessary, and it is further shown that even where such shipments were received, that when same arrived at the city of Louisville, instead of being delivered to the connecting carrier, they were unloaded at said Bourbon Stock Yards against the known request and wishes of the shippers.

The case of Little Rock & Memphis R. R. Co. and St. L. & Co. R. R., 63 Fed. 775, referred to in the opinion of the trial court, is wholly unlike the case at bar. In that case the connecting carrier, complained of, did not refuse to interchange traffic with the complainant common carrier, but exacted of complainant common carrier the prepayment of freight on all property received from complainant and because the said common carrier complained of did not require the prepayment of charges of their connecting common carriers it was claimed that such conduct was preferential and prohibited by the language of clause 3 of the Interstate Commerce Act.

In that case it was held that at common law a railroad had the undoubted right to require prepayment of freight charges from any or all of its customers as it might think best, but that for the common carrier complained of to exact prepayment of freight from the complainant in that action was not prohibited by the Interstate Commerce Act and that neither under the common law nor under the Interstate Commerce law had the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint traffic rates, but that in such matters such agreements of that character were for the common carriers themselves to make, as their better judgment might direct.

In all this we fully concur.

In the case of Oregon Short Line, etc., v. the Northern Pacific Railway Company, 51 Fed. 465, it was held that a common carrier could not be required under the 3d clause of the Interstate Commerce Act to receive freight in cars in which it is tendered by connecting carrier and transported in such cars, paying a mileage rate therefor when its cars were available for such service and the freight would not be injured by transfer.

In the case at bar, however, appellant does not ask that appellee be required to issue through bills of lading, but simply that appellee be required to indicate the destination of freight consigned to the Central Stock Yards, Kentucky, to the connecting carrier for delivery at Central Stock Yards, Kentucky, and deliver to said connecting carrier, Southern Railway Company, consignments of live stock so destined, with instructions given by the shipper, and it follows, therefore, that the cases referred to by the trial court in its opinion, and kindred cases, can not have any bearing upon the question presented by this record.

We respectfully submit, therefore, that considering the exact nature of the relief prayed for by the complainant in its

appeal, and that this relief did not include any through routing or contract between the Louisville & Nashville Railroad Company and the Southern Railway Company for joint traffic arrangements, a large portion of the opinion of the Court of Appeals was uncalled for, and devoted to a question not properly at issue in this case.

IV.

Under the common law, the Interstate Commerce Act and the Constitution and statutes of the State of Kentucky, the appellee is required, as a common carrier, to receive, transport, and deliver freight of all kinds and cars of freight tendered by shippers and consignors at any point on its line, and to deliver the same to the Southern Railway Company at its points of connection with the line of the appellee company, in every case where the consignor specifically orders that freight or cars of freight shall be so delivered to said the Southern Railway Company, and the appellee is required to carry, in accordance with such specific instructions, without discrimination and for reasonable charges.

Section 3 of the Act to Regulate Commerce, Vol. 1, Second Edition U. S. Supplement, page 529, reads as follows:

> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable

proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 213 of the Constitution of Kentucky reads as follows:

"Sec. 213. *Freight and cars to be handled and transported without discrimination.* All railroad, transfer, belt lines, and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines, or bridges, or doing a railway business in this State, shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge, or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any matter as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business."

We concede that at common law a common carrier was only required to carry freight tendered to it to the end of its lines, but we maintain, and shall undertake from the authorities to show, that at common law, and independent of the Interstate Commerce Act, common carriers were bound to serve any and all alike, and to carry any and all freight tendered them within the line of their duties, and upon payment of usual customary charges to deliver such goods to a connecting

carrier where the consignment was destined to a point beyond the lines of the initial carrier. And, further, that at common law it was and is the duty of a common carrier not only to deliver the goods to a connecting carrier, when destined to a point on the line of such connecting carrier, but that its duty at common law was not fully performed until the initial carrier transmitted with the delivery to the connecting carrier whatever instructions that may have been given to it as to the ultimate destination of the said consignment.

When the consignment is delivered to a connecting carrier with instructions as to its ultimate destination the liability of the initial carrier is ended, and it is a matter solely between the connecting carrier and consignor for further carriage of the goods by such connecting carrier, and the compensation to be paid to such connecting carrier.

This common law duty of a common carrier is well expressed by Mr. Elliott in his work on "Railroads," Vol. 4, Sections 1432 and 1440, as follows:

> "Sec. 1432. As a general rule, no carrier is bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, *the common law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier*, as the case may be. In such a case the goods are to be delivered by the initial carrier to a *connecting* carrier for further transportation; the former is considered as a forwarding agent rather than a carrier as to such further transportation and is not liable for the default of subsequent carriers. *Its whole duty is not always performed*, however, by merely *tendering the goods to the connecting carrier*. If the latter refuses to receive them, it is generally the duty of the initial carrier to notify the consignor or the consignee without unreasonable delay, and to store or otherwise take care of the goods for a reasonable time while awaiting instructions. . . . *So where instructions are given to it with the goods to be transmitted to succeeding carriers, it is the duty of such initial carrier to duly transmit them to the connecting carrier.*" (Our italics.)

Citing numerous authorities.

"Sec. 1440. It is, in general, the duty of the initial carrier to *obey* the instructions of the shipper, as to the route, mode of carriage and the like, and it should also *transmit the instructions of the shipper to the connecting carrier.*" (Italics ours.)

Citing North v. Merchants Trans. Co., 146 Mass. 315;
Palmer v. Chicago, etc., R. Co., 56 Conn. 137, 13 At. R. 818;
Little Miami R. Co. v. Washburn, 22 Ohio St. 324.

The leading case in the United States Supreme Court reports, at least that case seemingly considered by the text-writers to be the leading case, is that of Railroad Company v. Manufacturing Co., 16 Wall. 318. That case establishes the rule that a common carrier is only liable to the extent of his own route, and for the safe storage and *delivery* to the next carrier. The court, at pages 324 and 325, among other things says:

"Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route without delivery or any attempt to deliver to the connecting carrier."

Further, at page 326:

"*It is true the company were obliged to carry for all persons, without favor, in the regular course of business.*"

Further, at pages 328 and 329:

"The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. . . . *He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal.*" (Our italics.)

The case of *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 106, is an instructive case on the common law duties of common carriers, and in the course of the court's opinion by Justice Field, among other things, it is said :

> "A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are *received for transportation beyond the termination of its own line there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line*—the next carrier on the route beyond." (Our italics.)

See also Penn. R. R. Co. v. Jones, 155 U. S. 333;
Daner v. N. Y. Central, etc., R. R. Co., 50 Howard Pr. 428;
Little Miami R. R. Co. v. Washburn, 22 Ohio St. 330;
Parker v. V. S. C. B. & Q. R. R. Co. and Penn. Co., 56 Conn. 137;
Bosworth v. Chicago R'y Co., 37 Federal, 72;
R. R. Co. v. Manufacturing Co., 16 Wallace, 318;
Vincent v. C. & A. R. R. Co., 49 Ill. 41-44;
Coe v. L. & N. R. R. Co., 3d Federal, 778;
In re Peterson, 21 Fed. 889, and
North v. Transportation Co., 146 Mass. 315.

In support of the bill of complaint in this case there was read what was admitted to be a form of contract in use by appellee for the transportion of live stock over its lines, which said form of contract is ordinarily called a bill of lading, and therein it will be seen that it is provided, among other things, that—

> "The carrier agrees to transport said live stock to destination if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the next connecting carrier for transportation to or towards destination, and the carrier guarantees," etc. (See Rec., opposite page 58.)

From the bill of complaint and all the proof in support thereof it will be seen that the gravamen of the said complaint is the refusal of the appellee to indicate on bills of lading issued by it the destination, as Central Stock Yards, Kentucky, or any person thereat, and, refusal to show the routing as via Southern Railway Company at Louisville, Kentucky.

We think, under the authorities hereinbefore cited, it was and is the common law duty of appellee to receive, bill and transport to the end of its line all live stock tendered to it at any of its stations, and where destined to Central Stock Yards, Kentucky, on the line of the Southern Railway Company, to show the destination of such consignment and the routing thereof as desired by the owner and consignor of such live stock.

In the case of *Coe* v. *Louisville & Nashville R. R. Co.*, 3 Fed. 778, it is said:

> "The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, *their own private interests*, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights, offered for that purpose, in accordance with the usual course of business. *The delivery, when practicable, must be to the consignee.*"

In the case of *Vincent et al.* v. *C. & A. R. R. Co.*, 49 Ill. 33, it is said, on page 38:

> "The rule of the common law, requiring common carriers by land to deliver to the consignee, has been so far relaxed in regard to railways, from necessity, as, in most cases, to substitute, in place of personal delivery, a delivery at the warehouse or depot provided by the companies for the storage of goods. . . .
>
> Page 39: "If then, the common law rule requiring of common carriers an immediate delivery, when practicable,

to the consignees, has been relaxed, in regard to railways, only from necessity, it is difficult to see why the rule should not be applied, in its full force, to transportation of this character. Here the necessity of relaxation has not only ceased, but the railway is compelled to seek some other warehouse than its own freight depot, and to send its cars over a side track, to some private elevator. And where there are several elevators thus connected with the main line, in substantially the same mode, it is difficult to conceive how, as a question merely of common law, the railway company can be permitted to deliver grain to an elevator of its own selection, in place of that to which the property has been consigned. . . ."

A much earlier Illinois case on the same point was the case of *Michigan Southern & Indiana Railroad Co.* v. *Day*, 20 Ill. 375; it is said therein, on page 379:

"The undertaking of a common carrier to transport goods to a particular destination, it is said, necessarily includes the duty of delivering them in safety, and his obligation to deliver safely can only be avoided by the act of God or the public enemy. It is not sufficient that the goods be carried safely, but they must, and without any demand upon the carrier, be delivered, and when his responsibility has begun, it continues until there has been a due delivery. Angel on Carriers, Sec. 282.

"So it is held, Sec. 281, if a carrier is instructed by his employer to deliver goods on board of another vessel for a continuance of the transportation, and the goods are lost on board such other vessel, he is not responsible if he has safely placed them on board such other vessel, as, by so doing, his character as common carrier has ceased.

"The doctrine pervades the books, that the instructions of the owner or freighter must be obeyed as to the delivery, and if they do obey them in good faith, they are released from liability.

"In 8 Cow. 223, Ackley and Gray v. Kellogg et al., common carriers, who received goods to transport from New York to Troy, and at the latter place transferred them, pursuant to instructions from the bailor, on board a canal boat bound for the north, and the goods were lost by the upsetting of the boat, were held not to be liable, that their character as common carrier ceased at Troy,

and that having taken proper care that the goods were safely put on board the canal boat, they were not responsible for the loss. So where the master of a vessel is directed to tranship, or deliver on board another vessel, a delivery on board such other vessel is the termination of the duty of a common carrier. Van Santwood v. St. John, 6 Hill, 168.

"The case shows, that the direction of the freighter or owner must be obeyed to the letter, and if obeyed, no responsibility for loss is incurred."

A case that has been much cited and quoted from by all the courts in cases touching upon this question is the case of *Beers* v. *Wabash St. L. & P. R'y Co.*, 34 Fed. 244. In this Judge Gresham says, page 247:

"Although the property of the Wabash Company is in the custody of the court, it is operated by the Receiver as a common carrier. His rights and duties are those of a carrier. He is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic. It is his duty to receive from and deliver to other connecting roads both loaded and empty cars. He can not discriminate against one road by maintaining a policy of non-intercourse with it."

In the case of *Forsythe* v. *Walker*, 9th Pa. St. 148, it is said by Judge Rogers:

"Warehousemen and forwarding merchants are responsible only for want of good faith and reasonable and ordinary diligence; but one of the first duties of a consignee for transmission is to obey the instructions of the consignor, either express or fairly implied. When they undertake to vary from the instructions, proceeding from whatever motive it may, and a loss is occasioned thereby, they are clearly liable to the owner of the goods."

A case involving the appellee herein was the case of the *Louisville & Nashville R. R. Co.* v. *Odill*, 33 S. W. 611 (Sup. Ct. Tenn.).

In this case the court says, on page 612:

"There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands it, a

deviation from the route agreed upon with the shipper may be made and will be justifiable—as for instance, forwarding perishable freight by rail, when a storm prevents a boat from proceeding upon its voyage; but where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route, without notice to him and instructions from him. Unless justified by urgent circumstances, a deviation by the carrier will render it responsible for losses resulting, even from inevitable casualties and the original carrier becomes, in effect, an insurer for the line he selects."

In the case of *Johnson* v. *N. Y. C. R'y Co.*, 33 N. Y. 610, it is said by Judge Porter, on page 612:

"But when the forwarding agent is instructed as to the wishes of his principal, and elects to disregard them, he is guilty of a plain breach of duty. When he sends goods in a mode prohibited by the owner, he does it at his own risk, and incurs the liability of an insurer. . . .

"The primary duty of the agent is to observe the instructions of his principal, and when he departs from these, he must be content with the voluntary risk he assumes."

The case of McDonald v. Western R. R. Corporation, 34 N. Y. 497, outlines the liability of successive connecting carriers as indicated in the syllabus. This case decides that:

"Where goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond."

In the case of Hewett v. C. B. & Q. R'y Co., 63 Ia. 611, it is said by Judge Reed, on page 616:

"As we have already seen, its (the defendant's) undertakings were, *first*, to convey the property to Council Bluffs with safety and dispatch, and, *second* to deliver it within a reasonable time to some other carrier at that point, to be transported to its destination."

Perhaps one of the clearest statements ever made of this duty of the defendant to receive shipments destined to consignees on the line of the Southern Railway is conveyed in the case of C., B. & Q. R'y Co. v. B., C. R. & N. R'y Co., 34 Fed. 481. In the very able opinion by Judge Love in that case, it is said (page 483):

> "The United States Interstate Commerce Act provides that every common carrier shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivery of property and passengers to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business. . . .
>
> "The injury complained of is clearly irreparable, except by the remedy now prayed for by the complainant. It is a continuing injury. It may occur every day and many times a day. *This complainant is a common carrier, and can not refuse to receive and carry goods destined to persons living or doing business upon the defendant's lines.* . . .
>
> "The mandatory injunction against the defendant company and its chief officers as prayed will be granted, to continue in force, etc."

We desire also to respectfully call the court's attention to the fact that the application of this rule, that a common carrier is required to deliver to a consignee wherever possible, is just as clear in cases where the consignee is a connecting carrier as it is in the cases where the consignee is an individual upon the line of the original carrier.

This is laid down quite clearly in the case of *Inman* v. *St. L. S. W. R. Co.*, 37 S. W. 37 (Tex.) In the opinion of the court by Judge Williams, on page 41, it is stated:

> "To impose upon the carrier the duty of receiving and carrying to the end of its line, and there delivering to a

> connecting carrier, over whose line the property is destined, requires no contract. The right of the shipper to have his goods delivered to the connecting line is involved in the right to consign them as he chooses. He can not compel the first carrier, at common law, to assume any obligation beyond his own line; but, in our opinion, *he* has as clear a right to compel such carrier to carry to the end of his line and deliver, according to the usual course, to a connecting carrier, with which there is an established method of doing such business, as he has to have delivery made to any consignee whom he may select."

The application of the above principle is clearly indicated also in the opinion of Judge Baxter, reported in the case of *Dinsmore* v. *L. C. & L. R'y Co.*, 2 Flippin, 672 (C. T. Tenn.), where it is said, on page 678:

> "As a common carrier the defendant is as much bound to carry for another common carrier as it is to carry for other persons."

We desire at this point to call the court's special attention to the opinion in the case of *McCoy* v. *C. I. St. L. & C. R. Co.*, 13 Fed. 3.

The facts in this case were that the complainant owned a fully equipped stock yards situated on the tracks of the Cin. & Balt. R. R. Co., and adjacent to the stock yards of the United Railroads Stock Yards Company, also situated upon the same tracks, both stock yards being fully equipped with the necessary sidings, etc., for the discharge of live stock. The defendant had the right to use the tracks of the C. & B. R. R. by contract, and entered into a contract with the U. R. S. Y. Co. to deliver all stock consigned to Cincinnati to that Company's yards. Complainant in his bill asked for an injunction restraining the defendant from discriminating against him, and for a mandatory injunction to compel defendant to make deliveries to him on same terms as to his competitor. The opinion of Judge Baxter is a very strong one, well worthy of perusal, and is one

that we would like to quote in full, had we the space. In it, on page 9, the court says:

> "The business of receiving, feeding, dealing in, and forwarding live stock is legitimate and necessary. To do so on a scale commensurate with the trade of Cincinnati in that line necessitates large expenditures in the erection of buildings and equipment of suitable yards; and, being both legitimate and useful, *everybody engaging in it is entitled to equal facilities in the use of railroads*, upon which they are largely dependent for success; for it is obvious if the railroads centering at Cincinnati, or the officials who control them, are permitted to combine and establish a stock yard as a private enterprise, and by contract make it *the* depot of the roads for the receipt and delivery of all the stock brought to or carried through the city, and withhold like accommodations from their competitors, they can suppress competition, and establish and maintain a monopoly in that particular department of trade, and subject the public to the payment of undue and unreasonable exactions for the services rendered. *I am very clear that no such right exists.*" (Our italics.)

The court then grants the injunction as prayed.

We trust that nothing that we have heretofore said in relation to the fact that the duties to be performed by the Southern Railway in this case are what are technically known as "switching movements," and to the effect that the distance to be covered by the Southern Railway Company in transferring cars from the Louisville & Nashville R. R. Co. to the Central Stock Yards, will lead this court to infer that we believe that the Southern Railway Company would be acting in any other capacity than that of a common carrier in making such transfer. The law, as we understand it, is, that the distance over which freight is hauled, whether in car load lots or less, makes no difference with the fact that the company is acting as a common carrier. The point is hardly worthy of digression, but as outlining the law in this regard, we desire to quote from the case of *Missouri Pacific Railway Co.* v. *Wichita Wholesale*

Grocery Company, 40 Pacific, 899 (Sup. Ct. Kas. 1895), where it is said by Judge Allen, on page 900:

> "The distance over which freight is hauled, whether in car load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train."

Some question was sought to be raised by counsel for appellees in the courts below as to the right of appellant, conceding that it had the right to compel appellee to receive live stock destined to the Central Stock Yards and transfer same to the Southern Railway Company, to compel it to make such transfer without breaking bulk.

Where live stock and perishable freight which will suffer damage by delays and by reason of handling, are to be transported over more than one road, the initial carrier, *by reason of the long practice and recognized course of business in handling such freight, and the absolute necessity therefor*, must deliver same without breaking bulk to the connecting carrier, that is, without unloading, and it must permit its cars to be used to the destination of said shipment. This practice and course of business is so absolutely necessary and well established that the courts take judicial notice thereof.

This proposition seems to have been conceded by the Court of Appeals in the opinion rendered herein, and attention is now called to same merely for the purpose of showing that in the case at bar, the Louisville & Nashville Railroad, in delivering to the Southern road as requested, not only would not be required to load or unload said live stock, but in law would not be permitted to do so, but would necessarily turn over the cars in which said live stock was loaded, to the Southern Railway, to be delivered by said road to the Central Stock Yards, and that therefore the facts in the case

at bar places it outside of the rule in the Butchers and Drovers and Keith cases.

The authorities sustaining this proposition are as follows:

Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135;
Louisville & Nashville R. R. Co. v. Williams, 95 Ky. 199;
Jacobson v. Wisconsin, Minnesota & Pacific R. R. Co., 71 Minn. 532; 40 L. R. A. 392; 179 U. S. 287; 70 Amer. State Reports, 364;
Burlington C. R. & N. R. R. Co. v. Dey, 82 Iowa, 312; 12 L. R. A. 436;
Michigan C. R. Co. v. Smithson, 45 Michigan, 212;
Inman v. St. Louis S. W. R. R. Co., 37 S. W. Report. 37.

In the case of Peoria & P. Q. R. R. Co. v. C. R. I. & P. R. Co., 109 Ill. 135 (perhaps the leading case in the State courts on carriers), it was said, on page 139:

> "It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if, indeed, it would be possible, to transact the commercial business of the country."

In the Jacobson case cited above, it was said by the court, on page 392:

> "As incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies, and this is the ordinary and usual way of doing business. We are clearly of the opinion that the Legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered. The Supreme Court of Iowa reached the same conclusion in Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584. See also Atchison, T. & S. F. R. Co. v. Denver

& N. O. R. Co., 110 U. S. 667, 28 L. ed. 291; Peoria & P. U. R. Co. v. Chicago R. I. & P. R. Co., 109 Ill. 135, 50 Am. Rep. 615; Michigan C. R. Co. v. Smithson, 45 Mich. 212; State v. Wabash, St. L. & P. R. Co., 83 Mo. 144."

In the case of Burling. Cedar & N. R. Co. v. Dey, *supra*, it is said, on page 443:

"The course of business of railroad companies, originating in the wants and demands of commerce, requires the cars of one company to be delivered to another for transportation. It is presumed that rules relating to compensation for the cars transported are settled by agreement, or under rules recognized and prevailing in the business of transportation by railroads. At all events, the law provides rules under which this matter of compensation may be settled. . . . The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business, of which we will take judicial notice (Peoria & P. U. R'y Co. v. Chicago R. I. & P. R. Co., 109 Ill. 135), is a complete answer to the complaints made in the objections under consideration. Surely a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, can not, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road. Peoria & P. U. R. Co. v. Chicago R. I. & P. Co., *supra*."

The custom and right to thus interchange cars is also laid down in the case of the Wabash R. R. Co. v. Farrell, 79 Ill. 508, where it is said, on page 518:

"On the multiplicity of railroads throughout the country there are cars of many kinds varying much in

size, height, and form of construction, and no railroad company would be justified in refusing to receive the cars of other roads because they were not uniform with its own."

This doctrine was also laid down by the said court in the case of the *Chicago Great Western R'y Co.* v. *Armstrong*, 62 Ill. App. 228, where it is said, on page 234:

> "Railroads are compelled to haul the cars of other roads, provided they appear to be in an ordinarily safe and proper condition. As to their own cars, railroads choose which they will use; as to the cars of other companies, they have no opportunity for selection; because of this, the duty of railways in respect to the cars of other roads is merely that of proper inspection."

It is submitted that a common carrier can not take into consideration in entering into its contract of carriage, *for what purpose the shipment is made*, as, by reason of its privileges granted, it becomes a quasi public institution and must serve all alike who tender it shipments, affording all equal facilities for receiving, forwarding and delivering said shipments to and from its several lines and those connecting therewith, giving no unreasonable preference or advantage to any person, or corporation, or locality. This is no new doctrine, but is a fundamental principle of the common law clearly and forcibly stated by Judge Baxter in the case.

The third section of the Interstate Commerce Act is equally as broad upon this proposition as the common law doctrine just stated.

Admitting that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company and established as a general stock depot for receiving and delivery of stock at Louisville, Kentucky, as is held by the Court of Appeals, in view of the plain letter of the law it is difficult to see how this state of affairs can have any controlling or even persuasive influence in determining the legal propositions submitted.

It seems to be settled beyond controversy, that a common carrier must serve the public equally. It is certainly as well settled that where it holds itself out as a common carrier of live stock, it must accept such shipments tendered and make carriage thereof in the usual and customary way, that is, without breaking bulk, and in accepting such shipments, where the destination is not upon the lines of the initial carrier, but in order to reach the consignee it must be delivered by the initial carrier to a connecting carrier for delivery, the duty of the initial carrier is not discharged until he has made such delivery together with the instructions as to the destination, for if it were otherwise then certainly the general business of the country would greatly suffer, as in most shipments the consignor is unable to follow in person said shipment.

It is thought to be well settled that the right of the initial carrier to deliver at its established stock depot is dependent solely upon the question as to whether or not, under the contract of shipment, a *loading or unloading* of said stock is made necessary on the lines of said initial carrier at said point. It is certainly the only condition upon which *this right of delivery at said depot arises*, that is, the responsibility and trouble of unloading and loading. How, then, can the fact that this live stock is delivered for the the *Louisville market* make any change in the principle of the law under the state of facts existing in this case, which requires that the initial carrier shall deliver to the connecting carrier for delivery? There seems but one answer to this question, viewing it from the standpoint of defendant, as its defense is presented both by its answer and affidavits, that is, that it *will not deliver to the Central Stock Yards because, in doing so, it is thereby strengthening and building up an adversary of its own live stock depot.*

If the delivery of the shipment is to be made by a connecting carrier at a market other than that of Louisville, it is not thought that it would be contended that the Louisville

& Nashville Railroad *could not* be compelled to receive and make said delivery to the connecting carrier. What principle then of right or equity is there that changes the rule because the delivery is to be made to a connecting line for delivery to the consignee for the SAME MARKET whereon the common carrier has employed *a like enterprise?*

It is evident that the Court of Appeals concluded that as the Central Stock Yards was a *Louisville market*, the destination of shipments thereto was reached upon the arrival of the Louisville & Nashville trains at LOUISVILLE, and that, therefore, a DELIVERY was to be made by the LOUISVILLE & NASHVILLE, thus giving it the right to unload AT ITS STOCK YARDS and make such delivery therefrom. In view of the requirements of both the common law and the Interstate Commerce Act, it is respectfully submitted that this conclusion is erroneous, because the physical connection not only EXISTS BETWEEN THE TRACKS OF THE TWO ROADS, but is in constant use for all shipments, except those of live stock destined to the Central Stock Yards, and the only reason for this exception is shown by the answer of defendant and affidavits filed therewith; that is, that it and the Bourbon Stock Yards have expended considerable money in erecting and equipping said yards, and that it is entitled to deliver all stock hauled over its road at said yards, and to require it to deliver to the Southern would also put it to considerable inconvenience and require an additional engine and crew.

Stated briefly, the substance of defendant's defense herein is that to require it to deliver to the Southern would work an injury to its stock yards and prevent it from COMPELLING SHIPPERS to patronize same regardless of their wishes in the matter and prevent it from building up a monopoly at the Bourbon Yards, and would also compel it to furnish the public such service as is due from it by reason of the privileges granted.

If this is the law, then it necessarily results that whenever any railroad entering a given city establishes its stock

yards, if it happens that its lines pass through the stock-growing section of the country, as in the case of the Louisville & Nashville Railroad, then said road *can make a monopoly of the stock yard business*, although it may have a physical connection between its tracks and those of other roads in said city, upon which other roads there are also established stock yards; because, as shown in this case, and as is also a fact so well known that the court may take judicial notice of it, that to require the stock to be delivered at the Bourbon Stock Yards and there unloaded, and then reloaded and shipped to the Central Stock Yards, or driven on foot through the populous part of the city, a distance of some six miles, would cause such a loss to said stock in shrinkage and waste, damage and expense, as to make it entirely unprofitable to the shippers. This certainly ought not to be the law regarding the question, simply from a point of common honesty and fair dealing. The wishes of a shipper, where the facilities exist for carriage, certainly ought to be consulted. *He may have many good and valid reasons for desiring to patronize one yard instead of another, and the common carrier is granted its existence and privileges upon the idea that it will, according to its powers, furnish equal facilities for the receiving and forwarding and delivery of the property of said shippers to and from its several lines and those connecting therewith, and it has no right whatever to inquire before receiving said shipments* AS TO THE USES TO BE MADE THEREOF WHEN THE SAME REACHES ITS DESTINATION. *To grant it such power would place it above the interests of the people, that it is created for and required to serve*, and it certainly will not be contended that such reasonable and just requirements as are herein asked, although they may put said road to some inconvenience and require it to furnish additional rolling stock and service to handle the increase of business, will constitute any legal excuse.

The ANSWER in this case does not present any defense based on the idea of freights, but rests the entire case upon the two questions:

1. That having, at great expense, established its own stock yards, it has a right in law to deliver all freights coming over its lines at said stock yards.

2. That to require it to deliver to the Southern would disarrange its manner of transacting business, and put it to considerable trouble and expense in having to furnish an additional engine and crew.

This certainly presents a fair statement of the defense tendered, and it is submitted that it is shown by the bill that what may be termed the *technical* objections to the enforcement of the right to have this stock received and delivered have been fully met, bringing the case down upon its merits to the two propositions of defense stated.

If it be true that plaintiff is entitled, as a matter of law, to have these shipments delivered to the connecting carrier, then the violation of that right is so far-reaching and so detrimental to the interests of the Central Stock Yards, with its investment of some two hundred thousand dollars, and of such great importance to the public generally, that no court ought to permit technical questions to stand in the way of the enforcement of said right, unless compelled to do so by some imperative requirements of the law.

As to the second defense relied on by defendant, that is, that to require it to deliver to the Southern Railway would disarrange its manner of transacting business, and put it to trouble and expense in having to furnish an additional engine and crew, it is not thought that it will be seriously insisted that this defense is valid or constitutes any legal excuse whatever for the non-performance of a plain duty. The defendant is engaged in a public service, and has placed its property in such a position that the public has an interest in its use. It has assumed said relation, and agreed volun-

tarily to accept all the conditions of said service which attach. It does not perform said service with a single idea of profit, and it must comply with all requirements, although they may result in inconvenience, expense, etc.

Wisconsin M & P. R. Co. v. Jacobson, 179 U. S. 287;
Worcester v. Norwich & W. R. Co., 109 Mass. 112;
People *ex rel.* Green v. Duchess & C. R. Co., 58 N. Y. 152;
People *ex rel.* Kimble v. Boston & A. R. Co., 70 N. Y. 569;
People *ex rel.* v. N. Y., L. E. & A. R. Co., 104 N. Y. 58;
48th American Reports, 484;
9th N. E. 856;
Cotting v. Goddard, 183 U. S. 79;

The opinion of the Court of Appeals as understood is based largely upon the cases of

Stock Yards Co. v. Keith, 139 U. S. 228-36;
Butchers & Drovers Stock Yards Co. v. Louisville & Nashville Railroad Company, 67 Fed. Rep. 35;
Penn. R. R. Co. v. Commercial Bank of Chicago, 123 U. S. 727.

While the doctrine enunciated in these decisions is not questioned, it is respectfully submitted that under the facts in the case at bar said doctrine is not applicable.

It is earnestly insisted that these cases go no further than to determine that owing to the nature of these live stock shipments, facilities, other than those for dead freight, must be provided by the common carrier where such live freight is required *to be loaded or unloaded on its lines.* Such facilities may be furnished by others than the common carrier, and, if adequate, they will meet the requirements of the law; and such carrier can not be required, in any city, to furnish more than one depot where stock is to be loaded or unloaded; and the above cases, at first sight, seem to decide that it may, as a matter of right, deliver all such live freight coming over its lines at such depot *provided the destination of said shipment terminates on the lines of said common carrier at said city.*

A careful examination of the facts in these cases shows this distinction, however: In the Keith case, Keith was (p. 129) "engaged in buying and selling on commission, as well as on his own account, live stock brought to and shipped from the City of Covington, Ky., over the Kentucky Central Railroad." Also he was "the proprietor of certain live stock lots and yards in that city," and "was provided with all the necessary means of receiving, feeding, and caring for such stock *as he purchased or as might be consigned to him by others for sale.*" In other words, he had his own *private* yard and was in an entirely different position from the appellant in this case and the original complainants in the cases of *Coe* v. *L. & N. R. R. Co.*, 3 Fed. 778, and *Interstate S. Y. Co.* v. *Ind. U. R'y Co.*, 99 Fed. 472, all of whom maintained *public yards*, and stood in the position of *public warehousemen* ready to care for all who come. Appellant herein does not *buy and sell* stock; it *yards and cares* for it. The right of the railroad company to compel a *private individual* to accept a delivery of live stock at the yards maintained by it is certainly very different from its alleged right to build up a monopoly of the *public stock yards business.*

The Butchers and Drovers case simply decides that the carrier can not be compelled to build a spur track connecting a stock yards with its road where the grade of such track, if built, would render it useless for the purposes of the delivery of live stock. This can have no application to the case at bar, and does not conflict with *Coe* and *Interstate* cases, *supra*, which we discuss under VII of this brief.

It is thoroughly understood that carriers of live stock are required to furnish facilities for unloading such stock for the purpose of feeding and watering, as required by law, but that question does not arise, and is not involved in any way whatever in the case at bar, and is therefore not considered in the statement of the propositions of law.

It is respectfully submitted that the case of Penn. R. R. Co. v. Commercial Bank of Chicago, 123 U. S. 727, has but

slight bearing upon the case at bar. It simply states a general proposition of law as to the care in handling live stock. The Butchers & Drovers case, 67 Federal Reporter, and the Keith case, 139 U. S., do not touch upon the propositions presented by the case at bar, that is, where the initial carrier is simply sought to be compelled to receive for shipment over its lines and to deliver to a connecting carrier for delivery by said connecting carrier.

In the case at bar, appellant simply asks that the Louisville & Nashville Railroad Company be compelled to receive when tendered any live stock, and to bill, transport, switch, and deliver the same, as ordered by its consignor, to the Southern Railway Company at any point of physical connection between the tracks of said Louisville & Nashville Railroad Company and the tracks of the Southern Railway Company in Kentucky, at Louisville, Ky., for delivery by the Southern Railway Company to the Central Stock Yards, etc., and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock. In the bill it is alleged, and not denied by the answer, that the said two railway systems have heretofore received and delivered, and are now receiving and delivering, each one to the other and from the other, freight (other than live stock consigned to the Central Stock Yards) in car lots and less for delivery to consignees on the track or tracks of the one or the other. By the affidavit of S. A. Stalcup (Record, pages 23 to 24) this allegation is sustained, and while defendant fails to deny same in its answer, in the affidavits of Mr. Hines (pages 12 and 51 of the Record) he in substance admits this allegation, but says that said shipments were only made as to live stock going to and coming from *non-competitive points*, but as to dead freight he makes no exception whatever.

Our conclusion, from all the cases, thus comes down to this:

We believe it to be the rule, both at common law and under the Interstate Commerce Act and the statutes of and the Constitution of Kentucky, that the Louisville & Nashville Railroad Company is compelled to accept all stock tendered to it by shippers upon its lines, to be delivered by it to the Southern Railway Company at any point of connection, and that, having accepted such live stock, it must show its final destination as the Central Stock Yards upon the bill of lading, and must turn over the same to the Southern Railway at the point of connection in the cars in which it is shipped, *together with instructions to said Southern Railway as to its destination*, which last point we shall now take up.

V.

The duty of the appellee as a common carrier is not discharged until it delivers the freight or car of freight to the point of specified connection and furnishes to the agent of such known specified connection the instructions of the consignor or shipper as to the further carriage or delivery of the freight or car of freight.

The above principle is so well understood, and has been so often clearly and concisely laid down in the opinions of our courts, that we do not feel it needs the attention which we have given to Proposition IV, just preceding. We desire, however, to call the attention of the court to a few of the leading cases in which the ruling is laid down most concisely.

At common law, a common carrier was only required to carry freight tendered it to the end of its lines, but independent of the Interstate Commerce Act, common carriers

were bound to serve any and all alike, and to carry any and all freight tendered to them within the line of their duties, and upon the payment of their usual and customary charges, to deliver such goods to a connecting carrier where the consignment was *destined to a point beyond the lines* of the initial carrier. And further, at common law, it was and is the duty of a common carrier not only to deliver the goods to a connecting common carrier when destined to a point on the line of such connecting carrier, but its duty at common law was not fully performed until the initial carrier transmitted with the delivery to the connecting carrier *whatever instructions that may have been given to it as to the ultimate destination of the said consignment.*

When the consignment is delivered to a connecting carrier with instructions as to its ultimate destination, the liability of the initial carrier is ended, and it is a matter solely between the connecting carrier and the consignor for further carriage of the goods by such connecting carrier, and the compensation to be paid to such connecting carrier.

In the opinion rendered herein in the Court of Appeals, it is held that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company, and is a Louisville stock yard to be used in building up the live stock business to and from Louisville, and it is said by the court that these facts narrow the case to the consideration of the rights of complainant to require the Louisville & Nashville Railroad Company to make transfer to the Central Stock Yards Company over the connection of the Southern Railway of live stock whose destination is Louisville.

At common law, while a common carrier can not be compelled to carry beyond its lines or to make traffic arrangements with other roads for through billing, thus extending its lines by assuming responsibility for safe

delivery, yet at common law such carrier is in the exercise of a public duty or office, and as such is bound to carry safely whatever goods are entrusted to it for transportation within the course of its business to the end of its route, and if the destination of said shipment is off of or beyond the termination of its own line, there is super-added to its duty that of a forwarder by the connecting line, and when instructions are given to it with the goods to be transmitted to succeeding carriers, it is the duty of said initial carrier to duly transmit these instructions, and its responsibility is not discharged as a common carrier until it has so delivered said goods, *together with the instructions*. And as it is shown that the Louisville & Nashville Railroad Company is a common carrier engaged in the transportation of live stock, and that it has a physical connection between its tracks and that of the Southern Railway in Kentucky, at Louisville, Kentucky, and as by reason of the long practice and course of business rendered absolutely necessary in the shipment of live stock delivery thereof in bulk is required, that is, without unloading, said road in assuming the duties of a common carrier of live stock, undertakes and agrees with the public, *and is required by law*, to accept such shipments, to be handled *according to the usual custc .. and necessity of the case*, and where the destination is on the lines of a connecting carrier, to deliver it to said connecting carrier in bulk, that is, in its cars, as that is the usual and in fact the only way live stock is or can be handled.

If understood correctly, the Court of Appeals holds that said Central Stock Yards is a Louisville market, and *that the destination of the shipments made to it is the city of Louisville, Kentucky*, and as the Louisville & Nashville Railroad Company can not be compelled to have more than one depot of delivery in said city, it has the right to deliver said shipments made to the Central Stock Yards

at its depot of delivery, which is the Bourbon Stock Yards, in said city.

It is respectfully submitted that this conclusion is incorrect, because the right of delivery of live stock by a common carrier at its depot established for that purpose, is dependent *solely* upon the fact *as to whether or not said initial carrier is required to load or unload said stock;* and as said requirements and necessity for said depot only exist under that state of case, and as in the shipments to the Central Stock Yards the Louisville & Nashville Railroad Company is not only *not required to unload*, but under law can not refuse to permit same to be shipped to the Central Stock Yards in bulk, in its cars, delivery at its said live stock depot is not only unnecessary, but is in violation of appellant's rights.

For the purpose of argument, let us suppose that these shipments to the Central Stock Yards consisted of dead freight. Will it be contended that the Louisville & Nashville Railroad Company would not, under law, be compelled to receive said shipments, and on their bill of lading show the destination, *Central Stock Yards?* The live stock shipments only differ from the dead freight shipments as to the responsibility and trouble of loading and unloading, and if it be conceded, as the authorities seem to hold without conflict, that these live stock shipments are to be made without breaking bulk, that is, without change of cars, then this does away with said distinction between *dead* and *live* freight, because by reason of the nature of the live stock shipments the right to *unload*, on the part of the initial carrier, is denied.

It certainly can not be contended that it is any part of the duty of a common carrier to furnish to shippers of live stock any market therefor. The Louisville & Nashville Railroad Company has undertaken to provide for itself in

Louisville, Kentucky, not only a live-stock depot or loading and unloading chutes and pens, but a live-stock market for its patrons, and insists that shippers shall only patronize the market so provided by it. Can this be lawful and enforceable as against the wishes of the owners of live stock? We think not.

The case of *Bosworth v. Chicago, etc., R'y Co.*, 87 Fed. 72, is a recent and exceedingly well considered case, and in the course of the opinion of the court therein, Judge Woods, among other things, said, at page 81:

> "In respect to that car, no interruption in the course of transit having been contemplated or authorized either by the shippers or by the consignees, it may be said that the receiver, as one of the connecting carriers, was under the double duty—it would perhaps be proper to say as agent for the shipper—to *deliver possession and to communicate shipping directions to the next carrier; and that duty, in one aspect, not having been performed, his liability as carrier had not ceased.*" (Our italics.)

In the same case, in a separate opinion by Judge Jenkins, it is said, at page 81:

> "The owner or shipper of goods to be carried over connecting lines of railway is entitled to the protection afforded by the common law liability of a carrier until the goods have arrived at their destination, and a reasonable time has elapsed after their arrival to accept delivery of them; and, with respect to connecting lines, each carrier assumes the responsibility of an insurer while the goods are in transit over its particular line, and until delivery to the next succeeding carrier. R. R. Co. v. Manfg. Co., 16 Wallace, 318; Railroad Co. v. Jones, 155 U. S. 333."

The cases of Vincent v. C. & A. R. R. Co., 49 Ill. 41 to 44, and Coe v. L. & N. R. R. Co., 3 Fed. 778, with clearness state the common law duty of a common carrier, and

show that it is the duty of appellee to make delivery of live stock to the Southern Railway Company at one of the points of physical connection between its tracks and those of the Southern Railway Company in Louisville, Kentucky, for delivery by the latter company at Central Stock Yards, Kentucky, because such a delivery is practicable, can be more quickly made with less expense to appellee, and less time consumed in making delivery and return of cars than is required for delivery to be made at the Bourbon Stock Yards by appellee.

In the case of *Selma & Meridian R. R. Co. v. Butts*, 43 Ala. 385, it was said by Judge Peters, page 389:

> "And if the railroad company first receiving the goods for transportation, takes charge of them, to be carried over its own road to the end of its line, or to some specified point on such line, to be thence forwarded to a person beyond its own means of transportation, and such goods are directed to a particular consignee, at the place where the goods are first to be delivered and transshipped, it is the duty of such railroad company to deliver the goods to such consignee with notice of the instructions of the consignor or owner, to have them forwarded to the place of their ultimate destination."

One of the clearest decisions on this point is found in the case of *Little Miami R. R. Co. v. Washburn*, 22 Ohio St. 324, a leading case on this point. In that case Judge West said, at page 330:

> "A common carrier who receives goods under an agreement to transport them over the whole or any part of his own route, and then to forward them to a destination beyond, acts in the twofold capacity of carrier and forwarder. In the latter capacity, alleged negligence in which is the single ground of controversy presented by this record, he acts as agent of the consignor, and as such, is bound to transmit with reasonable exactness, to the next succeeding carrier, the instructions of his principal. If these instructions be without restric-

tion as to the subsequent route, intermediate consignment, or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of transit, with the like general instructions, in terms sufficiently explicit and unambiguous to inform him of their ultimate destination. Briggs v. Boston & Lowell R. R. Co., 6 Allen, 249.

"But if the instructions of the consignee [consignor ?] be special and restrictive the carrier will not have performed his duty as forwarding agent, if he shall have neglected or omitted to transmit, with the delivery of the goods to the next carrier, any material or substantive part of such special instructions."

In the case of *Colefax Mountain & Fruit Co.* v. S. P. Co., 46 Pac. 66, it was held that where a shipper delivers goods upon written contract with a railroad company to deliver the same to the next connecting carrier, said goods to go by "passenger service through," the original company will be liable for any delay if such delay results from its neglect to give instructions to the connecting lines conveying the freight to its destination.

In the case of *Dana v. N. Y. C. & H. R. R. Co.*, 50 How. Pr. 428, Judge Hardin said (page 429):

"The receipt declared that the company, in sending forward goods beyond the defendant's termini, shall act 'as the agent of the consignor or consignee, and not as carrier.'

"As such agent, it was its duty to give correct information and instructions as to the delivery of the property. If it gave others, it acted at its own risk and peril. (Johnson, Agt., v. N. Y. C. R. Co., 33 N. Y. 610; Goodrich, Agt., v. Thompson, 44 Ill. 324.)"

The cases of

McDonald v. Western R. Co., 34 N. Y. 497;
Hewett v. R. Co., 63 Iowa, 611;
R. R. Co. v. Mfg. Co., 16 Wallace, 318,

from which we have already quoted at length, all sustain this proposition; we, therefore, deem it unquestioned that a carrier who has assumed the duties of a forwarder must, at the time of delivery to the connecting carrier, transmit all instructions as to future routes and destinations.

VI.

The provisions of the Kentucky Constitution and statutes not being in conflict with the Interstate Commerce Act are in the nature of reasonable regulations in aid thereof and will be enforced by the Federal courts.

The question of requiring that a railroad company, by transfer of cars, interchange traffic in car load lots, make delivery to the point of destination, as directed by the consignor, and to a point beyond the termini of the original road under the authorities, is unquestionably subject to the power of regulation by act of Congress, and to regulation by State constitutional provisions and legislative enactments, the limitation of the State in its regulation being to the extent that it can not affect interstate commerce to an unreasonable extent, but may, incidentally, affect interstate commerce in the matter of local regulations.

The test determining whether the constitutional and statutory provisions of the State of Kentucky conflict with the legislation of Congress in the acts to regulate commerce must be by ascertainment of whether or not the said constitutional and statutory provisions are discriminating, and more particularly as to whether or not they tend to produce a conflict of regulations.

Under the police power the State Government may regulate the conduct of its citizens (and in such classification a corporation is a citizen) one towards another, and the

manner in which each shall use his property when necessary to the public good, and the regulation of common carriers, is incident to the existence of such power.

Munn v. Ill., 94 U. S. 125.

When the owner of property, as common carrier, devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he had thus created.

See Sanford v. Railroad Co., 24 Pa. St. 378;

Munn v. Illinois, 94 U. S. 126 to 130.

The State of Kentucky, under its police power, enacted Sections 213 to 217 of its Constitution and general statutory regulations as per Sections 818 and 819 of its general laws and regulations for the conduct of the business of common carriers, and the method of the transaction of business by one common carrier with another where there is a point of physical connection between the tracks of any two common carriers, and with the most careful study we fail to find any conflict between the constitutional and statutory provisions of the State of Kentucky with the provisions of the Act to Regulate Commerce, and are convinced that it was the duty of the trial court, where an interchange of traffic is commanded, as has been by the Act of Congress and statutory and constitutional provisions of the State in aid of such commerce, to have compelled compliance with such requirements by mandatory injunction.

The question, therefore, presented for determination under this phase of the case, is whether or not the appellee, Louisville & Nashville Railroad Company, shall be compelled to comply with the mandatory provisions of Section 3 of the Interstate Commerce Act and with the mandatory provisions of Sections 213 and 214 of the Constitution of Kentucky, or comply with its un-

authorized, illegal, and discriminating contract made with the Bourbon Stock Yards Company?

We submit that in all fairness there can be but one answer to such a question. Independent of the act of Congress and constitutional and statutory provisions referred to, we maintain that public policy forbids that common carriers shall be permitted to favor one shipper or one consignee, or one class of shippers or any class of shippers in making delivery to a particular class or a single consignee, and that a common carrier can not so disregard its general duty to the public to treat all alike, and to accept and carry goods without discrimination or prejudice either as to the persons to be served or to the points for delivery thereof.

Section 213 of the State Constitution of Kentucky only requires of common carriers doing business in Kentucky service of that character known as switching, and only from a point within Kentucky to some other point within Kentucky and the place of destination of freight, and such a switching regulation is not such an interference with interstate traffic as to make the regulations invalid, and it follows that compliance with said Section 213 of the Constitution may be exacted in the delivery of freight, although same may have originated in some other State than Kentucky.

The cases of Chicago, etc. R'y Co. v. Becker, 32 Fed. 849, and State of Iowa v. Chicago, etc., R'y Co., 33 Fed. 391, are the only Federal adjudications on this subject that we have been able to find, and they are conclusive of our contention in this regard.

As incidental to the operation of a railroad, it has the power to interchange cars with a connecting carrier, and such is the ordinary and usual way of doing business between common carriers, and the overwhelming weight of

authority, if not without contra authority, is that common carriers may by constitutional requirement or legislative enactment be compelled to interchange cars, the one with the other, for delivery on the line of the one or the other to a named consignee. See

Jacobson v. Wisconsin, Minnesota & Pacific R. R. Company, 71 Minn. 532; same case, 40 L. R. A. 392 and 179 U. S. 297, 70 Am. St. Rep. 364; also
Burlington, C. R. &. N. R. R. Co. v. Dey, 82 Iowa, 312, and particularly pages 334, 335, and 336, 12 L. R. A. 436;
Peoria & P. Q. R. Co. v. Chicago, R. I. & P. R. Co., 109 Ill. 135, and particularly pages 139 and 140;
Michigan C. R. Co. v. Smithson, 45 Mich. 212, and particularly pages 221 and 222;
The case of Inmann v. St. Louis S. W. R. Co., 37 S. W. Rep. 37, extensively reviews the authorities and is directly in point.

In the Jacobson case, *supra*, the Supreme Court of Minnesota, in passing upon the constitutionality of a legislative enactment requiring substantially what Section 213 of our Constitution requires, concludes its decision in the following language:

> "We are clearly of the opinion that the legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered." Citing numerous authorities. See full opinion for elaborate consideration of the question.

In the Court of Appeals of Kentucky, in the case of Louisville & Nashville Railroad Company v. Williams, 95 Ky. 199, the appellee in this case relied upon Section 213 of the State Constitution herein in exemption from liability in taking a car from a connecting carrier, as it had been com-

pelled by the said enactment to take the said car. At page 202 of the opinion, the court said:

> "It seems to us the constitutional provisions by which one railroad company is compelled (thereby admitting the contention of the L. & N. therein) to take cars of another over its line can have no bearing on this case. If the cars were in an unsafe condition, or were so defective in their construction as to render it unsafe to those who are required to handle them, it is the duty of the company to refuse to receive the car, if such defects exists, *and no other construction, it seems to us, can well be given this clause of the Constitution.*" (Our italics.)

It thus affirmatively appears that the Court of Appeals of Kentucky has construed Section 213 of its Constitution to the effect that if a car offered to a connecting carrier is not unsafe it is, by the said constitutional provision, required to accept the same.

The Supreme Court of Michigan, in the Smithson case, *supra*, 45 Mich., at page 222, in considering a legislative enactment similar to the provision of Section 213 of our Constitution, among other things, said (Cooley, Judge, delivers the opinion):

> "The necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish could hardly fail to be speedy and effectual."

In the case of Inmann v. St. L. S. W. R. Co. (Texas Civil Court of Appeals), 37 S. W. Rep., pages 37 to 45, an elaborate review of the authorities will be found, and the constitutionality of a legislative enactment similar to the constitutional provision as contained in Section 213 of our Constitution is upheld.

In the Iowa case, *supra*, Vol. 82, page 336, the Supreme Court of that State, in determining the constitutionality of a statute similar to the constitutional requirements of Section 213 of the Constitution of Kentucky, among other things said:

> "The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business, of which we will take judicial notice (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135), is a complete answer to the complaints made in the objections under consideration. Surely a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, can not, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligations to haul cars of other companies brought to it for transportation over its own road. (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135.) As the course of business of the railroad companies and the rules of law require them to transport the cars of other companies, surely a statute prescribing and enforcing the duty thus imposed can not be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies."

The principles enunciated and established by the cases of

Western Union Telegraph Co. v. James, 162 U. S. 650;
Wisconsin, Etc., R'y Co. v. Jacobson, 179 U. S. 287;
Lake Shore & Mich. Southern R'y Co. v. Ohio, 173 U. S. 285, and Smith v. Alabama, 124 U. S. 465,

are conclusive of the validity and enforcibility of the constitutional provisions and legislative enactments of the State

of Kentucky by the Federal court on general principles of equitable jurisdiction.

The James case, *supra*, involved the validity of a statute of Georgia, requiring every telegraph company with a line of its wires wholly or partly within that State to receive dispatches and on payment of the usual charges to transmit and deliver them with due diligence to persons within one mile of the telegraph station, or within the city or town of the receiving station. The test laid down in that case of the constitutionality and enforcibility of State regulations is whether or not they can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other States. (See opinion, page 660.)

The court, in the course of its opinion by Justice Peckham, at page 656, said:

> "It has been held that it is not every enactment which may incidentally affect commerce and the persons engaged in it that necessarily constitute a regulation of commerce within the meaning of the Constitution. Sherlock v. Alling, 93 U. S. 99; State Tax on Railway Gross Receipts, 15 Wall. 284; Mobile County v. Kimball, 102 U. S. 691; Smith v. Alabama, 124 U. S. 465. A State statute was held valid in this last-cited case, which provided for an examination of engineers of locomotives by a State Board of Examiners, and it was applied to an engineer engaged in running a locomotive on one continuous trip from Mobile in Alabama to Corinth in Mississippi. It was held to be a valid police regulation.
>
> "Legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect commerce itself. Mobile County v. Kimball, 102 U. S., already cited."

The constitutional and legislative enactments of the State of Kentucky were not designed to, do not purport to, and can not affect the conduct of or regulate the per-

formance of the duties of appellee outside and beyond the limits of Kentucky. The said State regulations are of a nature that are in aid of commerce, and require the performance of a duty on the part of the appellee that it was and is bound to perform, independent of and in the absence of said State regulations or the Act of Congress to regulate commerce.

Justice Peckham, in his opinion in the James case, at page 662, further said:

> "While it is vitally important that commerce between the States should be unembarrassed by vexatious State regulations regarding it, yet on the other hand there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce."

The communication or intercourse by telegraph messages between persons residing or located in different States is undoubtedly interstate commerce under all of the adjudged cases. If there is no unconstitutional interference with interstate commerce if a State statute regulates the transmission and delivery of telegrams, how can it be said to be an unconstitutional interference with interstate commerce for Kentucky to regulate and facilitate the interchange and quick delivery of freight in bulk, when confessedly that freight (live stock) can not be transferred from one car to another without serious damage thereto?

See also Western Union Telegraph Co. v. Howell, 95 Ga. 194, and
Western Union Telegraph Co. v. Bright, 90 Va. 778.

The case of Bagg v. Railroad, 109 N. C. 279, is an exceedingly well-considered case, and therein, among other things, it is said:

"So long as the State legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial Federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all."

Morgan S. S. Co. v. Louisiana, 118 U. S. 455;
Train v. Boston Disinfecting Co., 144 Mass. 523;
Smith v. Alabama, 124 U. S. 465;
Railroad v. Alabama, 128 U. S. 96;
Wilton v. Missouri, 91 U. S. 275;
Railroad v. Fuller, 17 Wall. 560.

If the court will bear in mind that under the proof heard on the motion for an injunction, and by the undenied allegations of the bill and amended bill of complaint, that it is conceded that from the break-up yards of appellee to Central Stock Yards, Kentucky, via Southern Railway Company in Kentucky and the Seventh and Magnolia Street connections of said railway systems in Louisville, Kentucky, the distance is only about one half of that from said break-up yards of appellee to the Bourbon Stock Yards, and that deliveries can be more quickly made of live stock destined to the Central Yards and reaching Louisville over the lines of the appellee than to the Bourbon Yards, it will the more readily be seen that such regulations as have been made by the State of Kentucky are only facilities in aid of commerce and in no wise regulations of such commerce within the meaning of the Federal Constitution.

The quotation from the Jacobson case, in the opinion of the trial court, at page 78 of the Record, that

"At common law the court would be without power to make such an order as was made in this case by the

> State court. Legislative authority would be necessary in order to give power to the court to render a judgment of this kind."

was and is wholly foreign to this case. The order spoken of in the quotation from the opinion was one requiring common carriers to condemn land for the purpose, and to make what confessedly exists in this case, namely, a physical connection of the tracks of one railway system with those of another.

The constitutional and statutory requirements of Ken tucky relied on undertake nothing of the kind, and the prayer in appellant's bill asked for no such relief.

The Supreme Court, in the Jacobson case, speaking through Justice Peckham, at pages 296 and 297, said:

> "If power were granted by the legislature, and it amounted in the particular case simply to a fair, reasonable and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it. (Atchison, etc., Railroad Company v. Denver, etc., Railroad Company, 110 U. S. 667, 681; People, *ex rel.*, etc., v. Boston & Albany Railroad Company, 70 N. Y. 569; People v. Railroad Company, 104 N. Y. 58.)
>
> "Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. (Olcott v. Supervisors, 16 Wall. 678, 694; Cherokee Nation v. Southern Kansas Railway Company, 135 U. S. 641; United States v. Joint Traffic Association, 171 *Id.* 505–569, 570; Lake Shore Railway Company v. Ohio, 173 *Id.* 285, 301.)

"It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same considerations that the use is a public one, and therefore taxation in support of such use is valid. (Olcott v. Supervisors, *supra*.) The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience."

Again, at page 301, it is further said:

"We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly or improperly affect the pecuniary rights or interests of the plaintiff in error."

The best-considered case to be found in the adjudged cases is, in our judgment, that of Lake Shore & Michigan Southern Railway Company v. Ohio, 173 U. S. 285 to 309. In that case, Justice Harlan, speaking for the court, enters upon an elaborate review of the authorities as to the extent the States of the Union may legislate with reference to the public convenience of its citizens, and after quoting with approval from the opinion in the James case, and in speaking of the adjudged cases, at page 297, said:

"They recognize the fundamental principle that outside of the field directly occupied by the General Government under the power granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are primarily for the deter-

mination of the State, and that its legislative enactments relating to those subjects, and which are not inconsistent with the State Constitution, are to be respected and enforced in the courts of the Union if they do not, by their operation, directly intrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is, to use the words of Chief Justice Shaw,—the power 'to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.' Commonwealth v. Alger, 7 Cushing, 53, 85, Mr. Cooley well said: 'It can not be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.' (Cooley's Const. Lim., 6th Ed., page 715.) It may be that such legislation is not within the 'police powers' of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental, or legislative, exists in each State, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

Page 302: "The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the State might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such

regulations as were just to all who might pass over the road in question. It was entitled of course to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statute is in aid of interstate commerce of that character."

It is submitted that Section 3 of the Interstate Commerce Act makes certain requirements of the carrier in general terms, that is, to require it to furnish equal facilities, *without going into detail as to said facilities*, while Section 213 of the Constitution requires no more than is perhaps required by the Interstate Commerce section (that is, as to any proposition involved in this case), but *does enter into detail*, setting forth specifically the acts required in order to furnish said facilities for the interchange of traffic, and forwarding and delivering same between the lines of appellee and those connecting therewith.

That it was intended by the 213th section of the Constitution and legislation had thereon, to require a common carrier to receive, deliver, transport, and transfer freight to any point that is in physical connection with the tracks of the other company there seems to be no doubt, in view of the language used in said section. That the highest court of the State of Kentucky so considered is evident from the language used in the case of the Louisville & Nashville Railroad Company v. Williams, 95 Ky. 199, hereinbefore quoted.

In the opinion rendered by the Circuit Court of Appeals in this case, it is said:

"It is thoroughly settled that the power of Congress to regulate commerce is plenary, and no State

> has the right to regulate purely interstate commerce. On the other hand, the State has the right to make provisions as to matters within its own boundaries intended as aids to commerce, not thereby regulating interstate traffic. Without undertaking to reconcile or consider the numerous decisions, we may refer to the County of Mobile v. Kimball, 102 U. S. 691."

Then, after making the quotation from said case, the court holds that the relief sought herein pertains to the transportation and delivery of interstate freight. That it is not the means of making a physical connection with other railroads that is aimed at, but that it is sought to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way, and that if the Constitution of Kentucky could be given such construction it would follow that it could regulate interstate commerce.

It is submitted that under the law as it now exists, where Congres has not acted the States may, and that even in cases where Congress has taken action as to the given proposition, that still the State may exercise its POLICE POWER and legislate, PROVIDED SUCH LEGISLATION IS NOT IN CONFLICT WITH THE PROVISIONS OF CONGRESSIONAL ENACTMENTS.

There are numerous authorities to the effect that the police power of a State can not be effectually granted or contracted away or in any wise relinquished, and following along said lines of authorities is the case of Louisville & Nashville R. R. Company v. Commonwealth of Kentucky, 161 U. S. 701; it is said, on page 702:

> "It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly

all the railways in the country have been constructed under State authority, and it can not be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

Page 701: "But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, *and add something to the cost of transportation, by the expense incurred in conforming to such regulations.* These are, however, like the taxes imposed upon railways and their rolling stock, which are, more or less, according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden. There are certain intimations in some of our opinions, which might, perhaps, lead to an inference that the police power can not be exercised over a subject confined exclusively to Congress by the Federal Constitution. But while this is true with respect to commerce itself, it is not true with respect to the *instruments* of such commerce."

It was said, in Sherlock v. Alling, 93 U. S. 99, 103, 104 (23–819–821), and quoted with approbation in Plumley v. Massachusetts, 155 U. S. 462 (39–244), that

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution, . . . *and it may be said, generally, that the legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens*, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon *citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.*
>
> "It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to *the instruments of such commerce*, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under State authority, and it can not be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the *interests of the public may seem to render desirable.* In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; *while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.*" (Our italics.)

The police power of a State, in its broadest acceptation, means the general power to preserve and promote public welfare, even at the expense of private rights, in order to

protect the health, peace, comfort, morals, convenience, and prosperity of the people of the State. This is shown by the Lake Shore, &c., R. R. Co. v. Ohio, 173 U. S. 285, and a number of other authorities.

In considering this question, it is very necessary to bear in mind that the Louisville & Nashville Railroad Company is a Kentucky corporation, created by the Legislature of Kentucky, and subject to control by same. The 213th section of the Constitution of the State of Kentucky as far as the questions involved in this case are concerned, is not in conflict with the provisions of the third section of the Interstate Commerce Act, but is plainly in aid thereof. Said section of the Constitution is not directed against interstate commerce shipments, but, as said in Wisconsin M. & P. R. Co. v. Jacobson, would plainly afford facilities to interstate commerce, and would in no wise regulate such commerce. Besides, it is evident from the bill and affidavits filed in this case, that there was a necessity for such requirement of delivery as to intra-state commerce, and conceding that such necessity exists for intra-state commerce in order to subserve the convenience and prosperity of the citizens of this State, as said in Sherlock v. Alling, 93 U. S. 99, 103–104 (23, 819–921), and reported with approbation in the Jacobson case, legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution, and it may be said generally that the legislation of a State not directed against commerce or any of its regulations but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of an obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.

It is conceded that where Congress has prescribed a regulation as to any given proposition respecting interstate commerce that said enactment is of a plenary nature, and that any State legislation in conflict therewith is void; but if such legislation be simply in aid of the congressional enactment; then it may be enforced, provided it is within the limits of the police power of said State; and it is thought to be the law that as to such police power the State can not effectually grant it away; but, however this may be, it is reasonably certain that if said enactment is not in conflict with the congressional enactment, and is within the limit of the police power, that it is enforceable.

In the case at bar, *while the Circuit Court of Appeals* seems to concede these propositions as stated, it holds that the State requirement of a delivery to a connecting line is a regulation of interstate commerce, as it pertains to the transportation and delivery of interstate freight, and not to the means of making a physical connection with other railroads. While it is true that it does not pertain as in the Jacobson case, to the means of making a physical connection with other roads, as a physical connection already exists, it is a regulation as to the means of delivery of all freight. The necessity therefor, as far as intra-state freight is concerned, is shown to exist, and it certainly has the right to regulate the delivery of such freight. If this incidentally or indirectly also regulates the delivery of interstate freight the destination of which is the city of Louisville, in the State of Kentucky, then it is not thought that this is such a regulation or requirement as to constitute an unreasonable interference with interstate commerce; and as said in Louisville & Nashville Railroad Co. v. The Commonwealth of Kentucky, 161 U. S. 699 (859): "Nearly all of the railways in the country have been constructed under State authority, and it can not be supposed

that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operations as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith, while to the State remains the power *to create* and *to regulate the instruments of such commerce* so far as necessary to the conservation of the public interests." Thus it plainly appears that the power of the State, although Congress has acted, is not exhausted by simply requiring the track to be laid and the connections formed, but it may, in addition thereto, regulate the instruments of such commerce. It would certainly be a useless requirement to make these carriers furnish reasonable facilities for the interchange of traffic between their lines and those of other roads and still not have the power to so regulate such commerce as to require its interchange by the use of such facilities. The purpose of the connection is but half served in laying the tracks. The main object thereof is the interchange of traffic. It is submitted that the court was in error in determining that a requirement to make delivery to a connecting carrier is such a regulation, considering the case presented, as is not enforceable, because, first, the plain construction of the third section of the Interstate Commerce Act requires such delivery. The constitutional provision is simply in aid thereof, and is within the limits of the reserve police powers of the State. It is a reasonable regulation, and does not interfere in any way whatever, by reason of delay of or otherwise, with the delivery of such shipments. While it may result in the control of the manner of delivery of interstate shipments, it does so only indirectly by the

exercise of an authority as to the regulation of the instruments of delivery, and not by direct enactment intended to control interstate freight.

In the case of Richmond & Allegheny R. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 311 (759), a contract of shipment was issued for the shipment of interstate freight, its destination being beyond the lines of the initial carrier, and said contract of shipment by express terms released said initial carrier of all responsibility upon delivery to the connecting carrier. Said shipment was made from the State of Virginia to a point in the State of Louisiana. There was at the time a provision in the code of the State of Virginia providing that in the case of such shipments the initial carrier should not be released from responsibility for loss, etc., except by contract in writing signed by the shipper. The case was submitted to the trial court on an agreed statement admitting the receipt of the goods, the issue of the bill of lading, the fact that it was not signed by the shipper, and the loss of the tobacco beyond the lines of the defendant. Plaintiff rested on the statute above quoted, and the defendant on its claim that the statute was a regulation of interstate commerce, and therefore in conflict with the Constitution of the United States. In said case, which was carried from the Supreme Court of the State of Virginia to the United States Supreme Court, this court held the carrier liable upon the idea that said State enactment, although it affected interstate commerce, was not a regulation thereof, but a rule of evidence made necessary by the State enactment in order to release such liability.

In Chicago, Milwaukee & St. Paul R'y Co. v. Patrick L. Solan, 169 U. S., page 133 (688), it is held that a State statute prohibiting contracts to exempt a railroad company from liability as a common carrier is not in any just sense a regulation of commerce, or void as to interstate business.

If the court will read the debates of the Constitutional Convention of Kentucky (1890) wherein Section 213 was adopted, it will be seen that the convention, in the interest of the general public, recognized the fact that it was no proper business of a common carrier to foster particular enterprises, but that, deriving its franchises from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all of its patrons on an *absolute equality*.

We have always understood the law to be, and the highest court of the State of appellee's creation has held, that public policy forbids that common carriers shall be permitted to favor one shipper or consignee, or one class of shippers or consignees, in discharging the general duty to accept and carry goods without discrimination or prejudice between classes. (See L. & N. R. R. Co. v. Pittsburgh & Kanawha Coal Co., 23 Ky. Law Rep. 1318.)

The Supreme Court of the United States, in Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503, in speaking of the rights of the defendant, Louisville & Nashville Railroad Company, under its charter as against the demands of the Constitution of Kentucky, of which Section 213 is a part, said, at pages 517 and 518:

> "As it has been said of the one so it may be said of the other, that the charter is taken and held subject to the power of the State to regulate and control the grant in the interest of the public.
>
> "In Pennsylvania Railroad v. Miller, 132 U. S. 75, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted such a contract between the State and the company as exempted the latter from the operation of the subsequently adopted constitution of Pennsylvania; that a constitutional provision, as

applied to the company in respect to cases afterwards arising, did not impair the obligation of any contract between it and State; and that the company took its charter subject to the general law of the State and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

"The same principle was announced in Louisville Water Co. v. Clark, 143 U. S. 1, and in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677."

Again, at page 518:

"It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interferance with interstate commerce; that the interferance with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State. (New York, Lake Erie & Western Railroad v. Pennsylvania, 158 U. S. 431, 439; Henderson Bridge Co. v. Kentucky, 166 U. S. 150.)

"A discussion of this subject will be found in the opinion of this court in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677, 701, where the same conclusion was reached."

It is thought that the case of Minneapolis & St. L. R. Co. v. Minnesota *ex rel.* R. R. & W. Com., decided June 2, 1902, by the Supreme Court of the United States, and found in 186 U. S. 257, and which involved the same act of the legislature that was under consideration in the Jacobson case, 179 U. S., has considerable bearing upon the questions herein raised. This case was brought by writ of error from the Supreme Court of Minnesota (see 80 Minn. 191, 83 N. W. 60), and in the opinion of said State court it is shown that joint

traffic arrangements existed between the several roads. The court held, however, in that case, that independent of such previously existing joint arrangements, no reason existed why under the amendatory act the commission could not lawfully compel a joint arrangement in a case like the one at bar. The court is respectfully referred to this State court opinion, as it seems to have been well considered.

The United States Supreme Court, however, on this point, held that it was not necessary to determine that question in the case, as all that it was required to hold was that where joint tariff between two or more roads had been agreed upon, such traffic is as much within the control of the legislature as if it related only to transportation over a single road. The intimation in said opinion, however, is clear that if it had been necessary to determine said question it would have approved the holding of the State court. (186 U. S. 260.)

In the course of said opinion Justice Brown said:

> "The constitutionality of the act of 1895 is attacked upon the ground that it authorizes the railway commission of the State to compel two or more railroad companies to enter into a joint tariff, and to make and adopt a joint rate for the transportation of property over the lines of such companies, as well as to make a division and to apportion the joint earnings among the several companies interested. It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be performed. This argument in its various applications is one which has been addressed to and considered by this court in nearly every case in which the power of the State to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is im-

possible for the State to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occupations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality, the latter being practically compelled to submit to such terms as the former may choose to exact, unless the State shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges.

. . . "Granting that a State has no right to interfere with the internal economy of a railroad further than to secure the safety and comfort of passengers, as, for example, to fix the wages of employes or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned. . . .

"We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several States. Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 16 Sup. Ct. Rep. 700), and that, IF THE POWER OF THE STATE COMMISSION WERE LIM-

ITED TO THE TARIFFS OF A SINGLE ROAD, IT WOULD BE WHOLLY INEFFICACIOUS IN A LARGE NUMBER, IF NOT IN A MAJORITY OF CASES—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the State to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis & St. Louis Company. It may also be said in this connection, that in Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. Rep. 115, we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, AS WELL AS FOR FACILITIES FOR THE INTERCHANGE OF CARS AND TRAFFIC BETWEEN THEIR RESPECTIVE LINES. The case did not involve the right of the Commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion they are in favor of such right. See also Burlington C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 338, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98. All that we are required to hold in this case is that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related only to transportation over a single line."

In this case, in speaking of joint traffic arrangements, it is said that "so far as applies to contracts already in existence, we have no doubt of the power of the State to supervise and regulate them."

As shown in the case at bar, no interference is sought whatever to be had with the freight charges from the point said goods are received to the city of Louisville, and the

charges for the switching movement does not and can not enter into said freight charge, but is a switching charge within the switching limits of the city of Louisville, in the State of Kentucky, that must be paid by the shipper, and with which the initial carrier is not concerned.

As it is thought this case also determines what was intended by said court to be held in the Jacobson case, that is, not only that connection at intersections of roads for transferring cars from the lines or tracks of one company to those of another may be compelled, but THAT FACILITIES FOR THE INTERCHANGE OF CARS AND TRAFFIC BETWEEN THE TWO LINES CAN BE ENFORCED.

This court, in the Jacobson case, reported in 179 U. S. 287, said, on page 295:

> "Plaintiff in error urges that transporting cattle from Minnesota to Iowa constitutes interstate commerce, and that neither the State of Minnesota nor its railroad commission has the right to in any manner interfere with or regulate such commerce. The judgment in this case, however, neither regulates nor interferes with that commerce, nor does that part of the statute upon which the judgment is founded. Whether any other portions of the statute does regulate such commerce is beside the question, and it is not necessary to here decide. To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding,and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly *afford facilities to interstate commerce*, if there were any, and *would in no wise regulate such commerce within the meaning of the Constitution*. That is all that has been done by the judgment under review. A State may furnish such

facilities or direct them to be furnished by persons or corporations within its limits without violating the Federal Constitution." (Our italics.)

There are not wanting, however, many other decisions, both of this court and the various State courts, to sustain this contention. In the case of *Nashville, Ch. & St. Louis R. Co. v. Alabama*, 128 U. S. 96, it was said, at page 99:

> "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that whenever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but is among their plain duties, to make provisions against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."

In the earlier case of Chicago & N. W. R. R. Co. v. Fuller, 84 U. S. 560, it was said, at page 568:

> "In the complex system of polity which exists in this country the powers of government may be divided into four classes:
>
> "Those which belong exclusively to the States.
>
> "Those which belong exclusively to the National Government.
>
> "Those which may be exercised concurrently and independently by both.
>
> "And those which may be exercised by the States, but only until Congress shall see fit to act upon the subject.

"The authority of the State then retires and lies in abeyance until the occasion for its exercise shall *recur*. (*Ex parte* McNeil, 13 Wall. 240, 80 U. S. XX, 625.)

"Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. (2 Story, Const., Secs. 1061, 1062.)

"The authority to regulate commerce, lodged by the Constitution in Congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must from the nature of things be uniform throughout the country. To that extent the authority must necessarily be exclusive, as much so as if it had been declared so to be by the Constitution in express terms.

"Others may well vary with the varying circumstances of different localities. Where a stream navigable for the purposes of foreign or interstate commerce is obstructed by the authorities of a State, such exercise of authority may be valid until Congress shall see fit to intervene. The authority of Congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so."

The case of the Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, contains a very clear statement of the powers of the State to prescribe safeguards and precautions in the management of railroads, even though such laws may, in a measure, affect interstate commerce. This court says, on page 137:

"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to its laws. It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled,

while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the laws of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation, those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

There is also another case reported in the same volume, the case of Missouri, Kansas & Texas R. Co. v. Haber, 169 U. S. 613, in which the court, at page 626, discusses the proper effect to be given to a Kansas statute as follows:

"Nor is the statute of Kansas to be deemed a regulation of commerce among the States, simply because it may incidentally or indirectly affect such commerce. . . .

"Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct

powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and State governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the State legislation may refer. . . .

Page 628: "This court, while sustaining the power of Congress to regulate commerce among the States has steadily adhered to the principle that the States possess, because they have never surrendered, the power to protect the pubilc health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national Constitution, or come in conflict with acts of Congress passed in pursuance of that instrument."

The court, in considering this case, should not lose sight of the fact that appellee is a Kentucky corporation and that it acquired all its rights under its charter subject to the power of the State of Kentucky through constitutional provisions or legislative enactments to regulate and control the grant in the interest of the public.

The case of *Smith v. Alabama*, 124 U. S. 465, has been much quoted from; in this case it was said, in an opinion by Judge Matthews, page 476:

"A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time or place, he is liable in an action for damage under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent

damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in Sherlock v. Alling, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employes of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?"

We desire to close our quotations from the cases on this proposition with one State case—the case of Bagg v. Wilmington C. & A. R. R. Co., 109 N. C. 279.

The opinion in this case is a very able one, by Judge Avery, and is entirely devoted to a discussion of the power of the States to pass laws affecting interstate commerce. It is much too long to quote in full, but we earnestly recommend its careful consideration.

On page 281 the court says:

> "So long as the State legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one Commonwealth to another, it is not repugnant to the Constitution of the United States, and *will be enforced, either as supplementary to partial Federal statutes relating to the same subject*, or in lieu of such legislation, where Congress has not exercised its powers at all. (Our italics.)
> Morgan S. S. Co. v. La., 118 U. S. 455;
> Train v. Boston D. Co., 144 Mass. 523;
> Smith v. Alabama, 24 U. S. 465;
> Railroad v. Alabama, 128 U. S. 96;
> Wilton v. Missouri, 91 U. S. 275;
> Railroad v. Fuller, 17 Wall. 560."

We submit to the court that the line of authorities as above laid down and quoted is too strong to permit of any doubt upon the question of the power of the State of Kentucky, either by its Constitution or statutes, to make reasonable regulations of the commerce of that State, even though such commerce shall be interstate commerce, so long as such regulations are in no way in conflict with the provisions of the Federal legislation in relation to such subjects and are in no way restrictive of interstate commerce.

We submit that the *conclusions* of the statutes and Constitution quoted in the former part of this brief fully meet these requirements, that complainant is entitled to have due force and effect given them, and under them, together with the Interstate Commerce Act, is entitled to all the relief prayed for in the bill.

VII.

The contract of the appellee with the Bourbon Company to deliver to it all live stock brought by the appellee to the city of Louisville is contrary to public policy and void, and its operation should be prevented by the courts.

Railroad corporations are *quasi* public corporations dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a quasi public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein.

Such a trust having been established it follows, as a matter of course, that it is beyond the power of any railroad to make any contract with any one individual by which it secures to that individual a monopoly or the control of its services in a certain line of work.

The cases on this are almost innumerable, but we shall only attempt quotations from comparatively few.

In the case of McCoy v. C. I., St. L. & C. R. Co., 13 Fed. 3, the law laid down as outlined in the syllabus was as follows:

> "A railroad company can not bind itself to deliver to a particular stock yard all live stock coming over its line to a certain point, but it is bound to transport over its road and to deliver to all stock yards at such point, reached by its tracks *or connections*, all live stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock yards discriminated against." (Our italics.)

In the case of L. E. & St. L. Consol. R'y Co. v. Wilson (late Indiana case), 18 L. R. A. 105, the rule as laid down in the syllabus is said to be:

> "A contract with a shipper of such character as to destroy the business of his rivals by giving him a monopoly is unjust, without regard to the consideration upon which it is based."

A case in the State courts often cited is that of Peoria & R. I. R. R. Co. v. C. V. M. Co., 68 Ill. 489. The decision in this case, as indicated in the syllabus, was as follows:

> "The primary consideration and principal object in the creation of railroad corporations, and in conferring upon them privileges not enjoyed by private citizens, was the accommodation of the public and the promotion of their interests. It was not merely to aggrandize and enrich the stockholders. The benefits to be derived by the stockholders are only incidental to accomplish the primary object.
>
> "The right conferred upon railroad corporations, in their charters, to carry passengers and property for a compensation, is coupled with a corresponding duty that they shall receive and carry passengers and freight over their roads as they may be offered. The acceptance of their charters is upon the implied understanding that they will fairly perform these duties to the public as common carriers of both persons and property, under the responsibility which that relation imposes.
>
> "The duties which railroad corporations owe to the public and which are the consideration upon which their privileges are conferred, can not be avoided by neglect, refusal, or by agreement with either persons or corporations. Therefore, any contract to prevent the faithful discharge of any of such duties will be against public policy and void."

The case of Inter-Ocean Co. v. Associated Press, 184 Ill. 438, deals with the rights of a telephone or telegraph com-

pany to make such a preferential contract. The court says, on page 448:

> "It has been uniformly held that a telegraph or telephone company is bound to treat all persons or corporations alike, and without discrimination in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations. (People v. Western Union Tel. Co., 166 Ill. 15.) Where one is the owner of property which is devoted to use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse, and the public interest in such use may be of a widely variant character, but where the use is one in which the public is interested or has an interest, public control is necessary for the common good. (Munn v. People, 94 U. S. 113.)
>
> Page 451: "The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties can not be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto."

One of the clearest opinions that we have been able to discover on the validity and effect to be given to such contracts is that rendered in the case of *Chicago & Northwestern*

R. Co. v. People, 56 Ill. 365. In that case the court says, at page 374:

"Since the 10th of August, 1866, the Chicago & Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the Galena, Northwestern, Munn & Scott, Union, City, Munger & Armour, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk, if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

P. 380. "The contract in question is peculiarly objectionable in its character and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such an elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So, too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such a charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such

a system would be the cause, when fully developed and managed by unscrupulous hands.

"Can it be seriously doubted whether a contract, involving such a principle and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouses the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at chosen warehouses is a deliberate policy, to be followed for a term of years, during which these contracts run.

P. 383. "The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases."

Citing:

Mariott v. L. & S. W. R. R. Co., 28 Eng. Com. Law, 498:
Gaston v. Bristol & Exeter Railroad Co., 95 Eng. Com. Law, 641:
Crouch v. The L. & N. W. R. Co., 78 Eng. Com. Law, 254;
Sanford v. Railroad Company, 24 Penn. 382;
Rogers Locomotive Works v. Erie R. R. Co., 5 Green, 380;
State v. Hartford & N. H. R. Co., 29 Conn. 538.

Many other State courts have passed upon similar contracts. In an early case in Pennsylvania, the case of Sanford v. R. R. Co., 24 Pa. St. 375, Judge Lewis said, at page 382:

"The power to regulate the transportation on the road does not carry with it the right to exclude any particular individuals, or to grant exclusive privileges to others. Competition is the best protection to the public,

and it is against the policy of the law to destroy it by creating a monopoly of any branch of business. It can not be done except by the clearly expressed will of the legislative power. Limited means may, perhaps, limit the amount of business done by a railroad company, but it can never furnish an excuse for appropriating all its energies to any particular individuals. If it possessed this power it might build up one set of men and destroy others; advance one kind of business and break down another, and might make even religion and politics the test in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate contract. Like the customers of a grist mill they have a right to be served, all other things equal, in the order of their application. A regulation, to be valid, must operate on all alike. *If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law and void.*" (Our italics.)

Many of the authorities on this point are collated by Judge Morrell in an opinion in the Hartford & N. H. R. R. Co. v. N. Y. & N. H. R. R. Co., reported in 3 Robertson, 411, where the court says, at page 415:

"Public policy is opposed to any infringement of the rights of travel or of any of the facilities which competition may furnish; and the law will not uphold any agreement which does or may injuriously affect such rights."
"Doolin v. Ward, 6 John, 194;
Hooker v. Vandewater, 4 Deins. 349;
Stanton v. Alton, 5 Deins. 434;
S. & B. R. R. Co. v. L. & N. S. R. R. Co., 21 Eng. L. & E. Rep. 319;
State v. H. & N. H. R. R. Co., 29 Conn. 538;
Hood v. H. & N. H. R. R. Co., 22 Conn. 502."

As early as 1839 the New Hampshire court had occasion to wrestle with this question, and their decision as indicated

in the syllabus of the case of Bennett v. Dutton, 10 N. H. 481, was as follows:

> "The proprietors of a stage coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal. And it is not lawful that they run their coach in connection with another coach, which extends the line to a certain place, and have agreed with the proprietor of such coach not to receive passengers who come from that place, on certain days, unless they come in his coach."

The Supreme Court of Kentucky was called upon in 1889 to pass upon a contract between competing steamboat lines containing an agreement on pool net earnings and stifle competition. This was in the case of Anderson v. Jett, 89 Ky. 375, where Judge Bennett said, at page 380:

> "That public policy that encourages fair dealing, honest thrift and enterprise among all the citizens of the Commonwealth, and is opposed to monopolies and combinations because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in, utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may, in fact, have that tendency, it is void as being against public policy."

In the case of Pueblo, etc., R. R. Co. v. Taylor, 6 Colo. 1, the court had occasion to pass upon the validity of a contract made by a railroad company with certain individuals in one town whereby the company in consideration of a grant of land, etc., agreed not to connect its road with a

neighboring town. Judge Stone said, on page 8 of the opinion:

> "Railroad companies are held to be *quasi* public corporations and agencies, their directors acting in the double capacity as agents for the company and as trustees for the public, clothed with an important public trust. Their roads subserve public purposes to such an extent that the public may impose upon itself the burden of taxation to aid in their construction (St. J. & D. C. R. R. v. Ryan, 11 Kan. 608), and the lawful exercise of the right of eminent domain, in the taking of private property for the purpose of their construction, is put solely upon the ground of public use. When, therefore, the public interests are brought in conflict with the private interests of the company, or of private individuals with whom such companies deal, such private interests must yield to those of the public. It logically follows that the public has a right to say that such companies shall not be permitted to make any contract which would prevent them from accommodating the public where entitled to it, in the matter of transportation and travel." (Court then quotes at length from case cited above.)

Coming to the Federal court, the first case we desire to quote from at length is one already cited and quoted from in an earlier part of this brief. The case of Coe v. L. & N. R. R. Co. A careful perusal of that case will show that the defendant therein, who is also the defendant herein, very early attempted to create a monopoly in the handling of live stock by a contract surprisingly similar to the one set up in its answer herein. The complainant in that case had a stock yards on the defendant's tracks and maintained the same for twelve years. At the end of that time the Union Stock Yards were built just outside the limits of Nashville, and defendant entered into a contract with the company owning the latter to make the Union Stock Yards its Nashville depot, and to deliver no stock billed to Nash-

ville at any other point of delivery, thus cutting off from complainant the deliveries of live stock which it had been accustomed to receive for twelve years past. The complainant applied for and obtained a prohibitory and mandatory injunction.

In the opinion granting the same, Judge Baxter said, on page 778:

> "The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their own private interests, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee."

The court then asks (p. 779) whether railroads have the right to select in any city, one particular place of delivery in various industries and compel all to patronize that place, and says:

> "If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. *We think they possess no such power to kill and make alive.* Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the people. By such an unjust exercise of such power they could destroy the business

of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one comunity for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever." (Our italics.)

We have already shown, in another portion of our brief, that where a connecting carrier is in the position of a consignee, it is entitled to be treated just the same as any other consignee. The decision of the court in the foregoing case was that the contract was absolutely null and void and contrary to public policy, and that the deliveries must be made to the complainant and the Union Stock Yards Company, without discrimination.

We submit that, in this case, the contract should be regarded as of just as little value and deliveries should be made to the connecting carrier, the Southern Railway Company, at its points of connection, just as they were ordered to be made to the complainant in the case last above cited.

Another very strong opinion is that of Judge Baker in the case of the Interstate S. Y. Co. v. Ind. U. R'y Co., 99 Fed. 472. In this case Judge Baker says, at page 482:

"The business reserved to itself by the Belt Railroad & Stockyards Company in its lease of its railroad and railroad property to the Indianapolis Union Railway Company is that of maintaining and operating a stock yards for private gain. In the lease to the Union Railway Company the latter agrees to assist and encourage the stock yards business of the lessor company so far as it may lawfully do so. This stipulation does not authorize the Union R'y Co. to assist the Belt R. R. & S. Y. Co. in its private business as a stock yards company in creating and perpetuating a monopoly. It is not to be supposed, whatever may be the private views of the judge as to monopolies and trusts, that any self-respecting court could anywhere be found that would sanction by its decree

the creation or maintenance of a monopoly or trust, unless constrained so to do by some imperative requirement of law. It is firmly settled that a railway company can not discriminate, even in favor of itself, in respect of business which is not railroad business proper. (R'y Co. v. Dohn (2d Sup.), 53 N. E. 937; Parkinson v. R'y Co., L. R. 6 C. P. 554; Nev. & McM. 280; Ilwaco R'y & Nav. Co. v. Oregon S. L. & U. N. R. Co., 6 C. C. A. 495, 57 Fed. 673.

"By a stronger reason it will not be permitted to discriminate in favor of the business of another, even where, for a consideration moving to it in respect to its railroad business, it has contracted to protect and encourage such other business."

In the case of C. M. & St. P. R'y Co. v. Wabash R'y Co., 61 Fed. 993, Judge Caldwell says, on page 997:

"A railroad company is a *quasi* public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy and void. (Railroad Co. v. Closser, 126 Ind. 348, 26 N. E. 159; Gulf, C. & S. F. R. Co. v. State (Tex. Sup.), 10 S. W. 81; State v. Standard Oil Co. (Ohio Sup.), 30 N. E. 279; Texas & P. R'y Co. v. Southern Pac. R'y Co. (La.), 6 South. 888; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Salt Co. v. Guthrie, 35 Ohio St. 666; Stanton v. Allen, 5 Denio, 434; Hooker v. Vandewater, 4 Denio, 349; Chicago Gaslight & Coke Co. v. Peoples Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; W. U.

Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Sayre v. Association, 1 Duv. 143; U. S. v. Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed. 58.

In closing, we desire to call the court's attention to two decisions of this court.

In the case of Gibbs v. Consolidated Gas Co., 130 U. S. 396, it was said, on page 410:

> "It is also too well settled to admit of doubt that a corporation can not disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.
>
> "'Where,' says Mr. Justice Miller, delivering the opinion of the court in Thomas v. West Jersey R. Co., 101 U. S. 71, 83 (25:950, 952), 'a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy.'"

In the later case of United States v. Joint Traffic Association, 171 U. S. 505, there are many statements in the opinion of value in the consideration of the point in question. We desire to only quote briefly from the opinion on page 570, where it is said:

> "The building and operation of a railroad thus required a public franchise. The State would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking

for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government, which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States, such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

"Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered."

CONCLUSION.

We have endeavored and sought by the foregoing authorities to show that this case can be decided by reference to a few leading principles of law, and by their application we contend that the following points have been established:

I.

That under the Federal Statutes, and especially the Elkins Act, the Circuit Court had jurisdiction of the subject-matter.

II.

That the interest of the appellant is sufficient to maintain the suit.

II.

That no contract for "through routing" or "joint rates" is sought to be obtained by this bill.

IV.

That under the common law, Kentucky statutes, Constitution and Interstate Commerce Act, the appellee should be compelled to accept all stock destined for the Central Stock Yards, offered it at any point on its line, and deliver the same to the Southern Railway.

V.

That in making deliveries, as aforesaid, it should also give the shipper's instructions as to the further routing and destination of the stock.

VI.

That the Kentucky statutes and Constitution securing to the complainant the above rights are not such regulations as will be considered an improper interference with the right of the Federal Congress to regulate interstate commerce.

VII.

That the contract of the appellee with the Bourbon Company, relied upon by it as its defense and excuse for the discriminations sought to be prevented, is illegal and void, and should so be declared by this court.

VIII.

That appellee, as a common carrier, can be compelled to do business in the usual and customary way, and as live stock of necessity must be transferred in bulk, such transfer by one common carrier to another for delivery purposes only, and within the switching limits of the city of destination, in conformity to a State police regulation, is not an unreasonable requirement or interference with interstate commerce.

Respectfully submitted.

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W. M. SMITH,
W. D. WASHBURN,
Counsel for Appellant.

JOHN L. DODD,
of Counsel.

FILE COPY.

No. 149

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Supreme Court of the United States,

OCTOBER TERM, 1902.

THE CENTRAL STOCK YARDS COMPANY, - - - - - *Appellant,*

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - - - - - - - - *Appellee.*

Jefferson Circuit Court,

CHANCERY DIVISION.

THE CENTRAL STOCK YARDS COMPANY, - - - - *Plaintiff,*

No. 20369. VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - - - - - - - - *Defendant.*

OPINION OF THE COURT BY

JUDGE SHACKELFORD MILLER.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

Jefferson Circuit Court.

CHANCERY DIVISION.

CENTRAL STOCK YARDS CO., - - - *Plaintiff,*

No. 80269. *VERSUS*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - *Defendant.*

Opinion.

This is an action by the Central Stock Yards Company, in which it asks a mandatory injunction against the Louisville & Nashville Railroad Company compelling it to switch and deliver to the Southern Railway Company in Kentucky, at one of the points of physical connection between the tracks of these two roads in Louisville, six car loads of live stock, which have been shipped over the Louisville & Nashville road to the Central Stock Yards, and to so switch and deliver in the future all like freight that may be brought by it, destined to the Central Stock Yards, and that it be compelled to receive, switch, and deliver all live stock offered to it for shipment over its lines to the Central Stock Yards. A temporary order was granted in accordance with the prayer, and the six cars have been delivered to the Southern Railway and by it to the Central Stock Yards. The action is now submitted upon plaintiff's motion for an injunction pending the preparation and trial of the action upon its merits. The Central Stock Yards are owned by the Central Stock Yards Company, and are situated upon the line of the Southern Railway, about nine

miles from its terminus in Louisville, and just beyond the southeastern limits of that city. The "break-up yards" of the L. & N. R. R. are near the intersection of Fourth and G streets in South Louisville, and only about a hundred yards from the Central Stock Yards. The L. & N. R. R. Company's tracks and the tracks of the Southern Railway intersect at this point. There is also physical connection by switch between the tracks of the two roads at Seventh and Magnolia streets, which is about a mile and a half northeast of the "break-up yards." This last route is and has been in constant use for quite a while, in transferring cars as is here asked.

The plaintiff, the Central Stock Yards Co., shows that it has constructed and has in operation a modern stock-yard plant, and that its business is that of feeding, watering, properly caring for, having sales made of and the safe loading and unloading of live stock of every character; that the lines of the defendant, the Louisville & Nashville Railroad Company, extend through the principal counties in Kentucky wherein live stock is raised in any considerable quantity for sale; that more than fifty per cent of all the live stock raised in Kentucky can reach a market therefor only over the lines of the defendant; that defendant has announced its purpose to decline to receive at any station on its line any live stock to be billed, transported, transferred, or switched to any connecting carrier, and particularly to the Southern Railway Company at Louisville for delivery by such connecting carrier to the plaintiff's yard, or to any person thereat, and that in keeping with its said announced purpose defendant has distributed circulars throughout the country and given instructions to all of its station agents and employes not to receive, bill, transport, transfer, or switch any live stock at any of the points of physical connection between its lines and those of the

Southern Railway Company in Kentucky at Louisville for delivery by the latter company to plaintiff, or any one at its yards. It alleges that such action on the part of the defendant was and is unlawful, arbitrary, and discriminating against plaintiff and other persons doing business with plaintiff, of great injury to plaintiff, and that the injury so inflicted was and is of a continuing character not susceptible of actual pecuniary estimation, and that resort to actions at law will involve a multiplicity of suits, none of which could or would end the litigation, and therefore the only adequate remedy is in equity and by injunctive process.

The defendant presents three defenses:

First. That the shipper and not the plaintiff Stock Yards Company is the party injured, if any one is injured, and that the Stock Yard Company can not therefore maintain this suit.

Second. That it has heretofore established and furnished a sufficient depot, known as the Bourbon Stock Yards, with sufficient facilities for the handling, feeding, and caring for all live stock coming to the city of Louisville, and that it is not required to establish any other live-stock depot in said city; and

Third. It admits that it can make a delivery of all live stock consigned over its line to the Southern Railway Company at Louisville, Kentucky, and destined to the Central Stock Yards, or to the plaintiff, Central Stock Yards Company, or in its care, but that to do so, the said Louisville & Nashville Railroad Company will or may have to employ a special engine to take such live stock directly from its yards at South Louisville to the Magnolia and Seventh Avenue connection of its tracks with the tracks of the Southern Railway Company in Kentucky at Louisville, for delivery by such latter road to said Central Stock

Yards Company, and that in so doing the engine would have to get behind these live-stock cars and push them into this point of physical connection, and that an extra engine and crew will have to be employed.

This action is based upon Section 213 of the present Constitution of Kentucky, which reads as follows, in so far as it applies to railroads:

> "All railroad . . . companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad in this State, *shall* receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads or less quantities coming to or going from any railroad, or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor in any matter as to payment, transportation, handling or delivery; and *shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies.*"

The defendant, by way of answer to the demand of plaintiff that defendant be required to comply with the mandatory section of the Constitution, says it has, by contract with the Bourbon Stock Yards Company, established that place as its live-stock depot in the city of Louisville. The fourth clause of that contract reads as follows:

> "The first party agrees that it will not lease, rent, or sell any of its ground in the city of Louisville for the establishment of a stock yard, or otherwise facilitate the establishment of a stock yard, in the said city, and will establish no other stock depot in the said city, and that it will deliver and cause to be delivered to the second part, so far as it legally may, all live stock shipped over the roads of the first party and consigned to the city of Louisville, and should

any live stock be shipped to other person or persons in said city, the first party hereby makes and agrees to make the stock yards of the second party the stock depot of the first party for said city, and agrees to unload all live stock shipped to said city at the yards of the second party, *but if the provisions of this section of this contract be abrogated or invalidated by judgment of any court or by legislative requirement, then the second party shall have no claim to damages arising out of or dependent on said provisions and the second party shall, at its own cost and expense, defend any and all litigations which may arise out of the provisions of this section, and will hold the first party entirely harmless therefrom.*"

In this connection, counsel for plaintiff cited Section 214 of our Constitution, which reads as follows:

> "No railway . . . company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier."

1. In answer to the objection that the plaintiff has no right to maintain this action, it is clear that plaintiff is vitally interested in the result of the action and that the ultimate success of its stock-yard business is largely dependent upon requiring the defendant to comply with the provisions of the Constitution *supra*, and further, that injunctive process is the only adequate remedy. This is shown by the stock-yard cases relied upon by counsel for defendant.

In Covington Stock Yards Company v. Keith, 139 U. S. 128, an injunction was granted and the decree appealed from was affirmed, which necessarily held that such remedy was the only adequate and proper one for such state of case.

In Butchers' & Drovers' Stock Yards Co. v. L. & N. R. R. Co., 14 C. C. A. 290, 67 Fed. Rep. 41, objection was raised to the right to maintain such suit because of the

continuous supervision by the court which would become necessary if such relief was had. In overruling that contention, Judge Taft said:

> "It is said that the court of equity will not attempt to enforce the remedy here sought, because it will involve a continuous supervision by the court of transactions between the complainant and the defendant, which would tax the court with the details of superintendence beyond anything a court of equity will undertake; and a number of cases are cited to the point. We think the objection can not be sustained."

And in Interstate Stock Yards Co. v. R. R. Cos., 99 Fed. Rep. 483, the court said:

> "The nature of the wrong complained of, the fact that it is of a continuing character, that it is not susceptible of accurate pecuniary estimation, and that resort to actions at law would involve a multiplicity of suits, none of which would end the litigation, all tend to make it manifest that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity. The jurisdiction in equity does not depend upon the fact that there is no remedy at law. It is afforded whenever the remedy at law is not as full, adequate, and complete as in a court of equity. The rule that equitable relief will not be granted until the complainant's right or title in respect of the subject-matter has been established in an action at law, does not apply where the subject-matter of the litigation is to prevent discrimination in violation of the Interstate Commerce Act."

High on Injunctions, Section 616, and a great number of authorities, might be added in support of the doctrine above enunciated in the Interstate Stock Yards Company case.

The question as to whether or not the defendant, the Louisville & Nashville Railroad Company, shall be required

by this court to establish and furnish any live-stock depot other than the Bourbon Stock Yards for the handling, feeding, and caring for live stock transported by the Louisville & Nashville Railroad Company, is not involved in this case.

It is not asked in the petition that the Louisville & Nashville Railroad Company make delivery to the Central Stock Yards Company, or to any person at its yards, or to any stock yards located upon its lines. *On the contrary, this is purely and simply a switching case under Section 213 of the Constitution* so far as the facts set forth in the petition are concerned. For the sake of the argument, the defendant's contention that it will not be required to furnish more than one live-stock depot in a city may be admitted, but that fact would not, in my opinion, affect the question presented for decision. The petition in this case is fashioned after the petitions in the numerous cases of a like kind which have been cited upon this hearing. I am of opinion that the petition states a cause of action, and that the plaintiff may maintain it.

2. In considering the second ground of defense, it is important to keep in mind the fact that plaintiff is proceeding under the express authority and letter of the Constitution bearing directly upon the point under consideration.

The numerous cases cited on the oral argument may be classed in somewhat general terms (1) as stock-yard cases proper, and (2) cases involving interchange of cars at physical connections of railways. The first class of cases have been generally decided upon the general principles of the common law as applicable to common carriers, while the second class is governed by Constitutions or statutes.

It is a mistake to say that we have, in the case at bar, a stock-yard case proper. This latter class properly em-

braces only those cases in which the courts have considered how far the law would compel the delivery of live stock at some stock yard in a given city other than the one owned and controlled by the carrier itself, or operated through some agency which the carrier has selected. Covington Stock Yards Co. v. Keith, 139 U. S. 128, is a case of that class.

As we are not now considering exclusively a stock-yard case, it is not vital that we look to these cases. But let us see if the numerous cases in this class can be said to establish any general rule. I think they establish this rule only: That where the carrier furnishes its own stock yards, either by building them itself or adopting the yards of another, it can not be compelled *under the common law* or the Interstate Commerce Act to furnish any other stock yard or any appliances therefor for loading or unloading live stock at any other point in the city upon its own lines than that at its own yards.

But where ample facilities for loading and unloading are furnished by another line, and yards are there erected on the other carrier's track, so that the carrier may deliver stock with equal safety at said yards, then such delivery may be required certainly under our Constitution, if not at common law.

If this latter proposition is put in doubt by some conflict of authority, under the common law it is certain that wherever there is statutory or constitutional enactment looking to a prohibition of any discrimination in regard to the delivering, handling, care, and custody of freight, there can be no such discrimination, and similar treatment may be demanded by all in the same business.

Section 214 of the Constitution does not mean that a carrier must build platforms or chutes, etc., for any and all who may want stock yards on the line of the road, but it

does mean that all individuals and all corporations engaged in the stock-yards business must be treated alike, and no exclusive or preferential contract for the care and custody of stock can be made.

We have here nothing to do with the modification made in Section 215 on the subject of freight rates between two given points on the same road, or with the meaning of the words "freight of the same class and on the same conditions" found in that section.

But aside from Section 214 and independent of it, the case we are considering comes clearly within the provisions of Section 213 of the Constitution, where the matter of shipments to points where there is physical connection between railways is considered.

The terms of this section are explicit, and no amount of argument can make its meaning clearer than that expressed by its very words. But if there were any doubt as to the meaning of the Constitution and we were required to look to the debates of our Constitutional Convention or to the decisions of the courts upon similar questions for aid, we are still further fortified in the conclusion heretofore reached.

From the debates of the Constitutional Convention (Vol. 4, pages 5118 to 5162), it will be seen that the convention, in the interest of the general public, recognized the fact that it is no proper business of a common carrier to foster particular enterprises, but that deriving its franchise from the legislature and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all of its patrons upon an *absolute equality*.

Railroad Company v. Goodridge, 149 U. S. 680.

Public policy forbids that common carriers shall be permitted to favor one shipper, or one class of shippers, in discharging the general duty to accept and carry goods without discrimination or prejudice between classes.

L. & N. R. R. Co. v. Pittsburgh & Kanawha Coal Co., decided November 13, 1901, by Court of Appeals of Kentucky, but not yet reported.

As incidental to the operation of a railroad, it has the power to interchange cars with a connecting carrier, and such is the ordinary and usual way of doing business between common carriers; and the overwhelming weight of authority is to the effect that common carriers may, by constitutional requirement or legislative enactment, be compelled to interchange cars, the one with the other, for delivery on the line of the one or the other to a named consignee.

Jacobson v. Wisconsin, Minnesota & Pacific R. R. Company, 71 Minn. 532; S. C., 40 L. R. A. 392; 70 Am. St. Rep. 364.
Burlington C. R. & N. R. R. Co. v. Dey, 82 Iowa, 334, 335, 336; S. C., 12 L. R. A. 436.
Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co., 109 Ill. 139, 140.
Michigan C. R. Co. v. Smithson, 45 Mich. 221, 222.
The case of Inman v. St. Louis S.-W. R. Co., 37 S. W. Rep. 37, reviews the authorities at length and is in point.

In the Jacobson case, *supra*, the Supreme Court of Minnesota, in passing upon the constitutionality of a legislative enactment requiring substantially what Section 213 of our Constitution requires, concludes its decision in the following language:

"We are clearly of the opinion that the legislature has the power to compel a common carrier to do busi-

> ness in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered."

In our Court of Appeals, in the case of R. R. Co. v. Williams, 95 Ky. 199, the defendant relied upon Section 213 of the State Constitution as an exemption from liability for damages, because it had been compelled by Section 213 to receive the car which had caused the accident. The court recognized the inability of the company to refuse the car, but decided the case upon another point, saying:

> "It seems to us the constitutional provisions by which one railroad company is compelled to take cars of another over its line can have no bearing on this case. If the cars were in an unsafe condition, or were so defective in their construction as to render it unsafe to those who were required to handle them, it is the duty of the company to refuse to receive the car if such defect exists, *and no other construction, it seems to us, can well be given this clause of the Constitution.*"

It thus affirmatively appears that our Court of Appeals has construed Section 213 of our Constitution to the effect that if a car offered to a connecting carrier is not unsafe, it is, by the said constitutional provision, required to accept it.

In the Smithson case, *supra*, 45 Mich., at page 222, in considering a legislative enactment similar to the provisions of Section 213 of our Constitution, Judge Cooley said:

> "The necessities of commerce required this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish could hardly fail to be speedy and effectual."

In Peoria, &c., R. R. v. R. R. Co., 109 Ill. 139, the Supreme Court of Illinois held that common carriers, even in the absence of a statute, were required to interchange cars, and in reaching such conclusion used the following language:

> "It is a matter of so much public concern that judicial notice may be taken of the fact, that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if indeed it would be possible, to transact the commercial business of the country."

In Inman v. St. L. S.-W. R. Co., 37 S. W. Rep. 37-45, an elaborate review of the authorities will be found, and the constitutionality of a legislative enactment similar to the constitutional provision as contained in Section 213 of our Constitution, is upheld.

In the Iowa case, *supra*, Vol. 82, page 336, S. C., 12 L. R. A. 436, the Supreme Court of that State, in passing upon and upholding the constitutionality of a statute similar to the constitutional requirements of Section 213 of our Constitution, said:

> "The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business, of which we will take judicial notice (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135), is a complete answer to the complaints made in the objections under consideration. Surely a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, can not, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railroad company, as a common

carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road. (Peoria & P. U. R'y Co. v. Railroad, 109 Ill. 135.) As the course of business of the railroad companies and the rules of law require them to transport the cars of other companies, surely a statute prescribing and enforcing the duty thus imposed can not be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies."

Railroad corporations are *quasi* public corporations dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein.

McCoy v. C. I. St. L. & C. R. Co., 13 Fed. Rep. 3;
Coe v. L. & N. R. R. Co., 3 Fed Rep. 778;
Interstate Stock Yards Co. v. R. R. Cos., 99 Fed. Rep. 472;
L. E. & St. L. Consol. R'y Co. v. Wilson (late Indiana case), 18 L. R. A. 105.

In the McCoy case, *supra*, quoting from the syllabus, it is said:

"A railroad company can not bind itself to deliver to a particular stock yard all live stock coming over its line to a certain point, but it is bound to transport over its road and deliver at such point, reached by its tracks or connections, all live stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock yards discriminated against."

In the Coe case, *supra*, the court said:

> "The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their owr private interests, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights, offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee."

In the Wilson case, *supra*, quoting from the syllabus, it is said:

> "A contract with a shipper of such character as to destroy the business of his rivals by giving him a monopoly is unjust without regard to the consideration upon which it is based."

At common law, therefore, and independent of the mandatory provisions of Section 213 of our Constitution, it would seem that it is the duty of the Louisville & Nashville Railroad Company to make delivery of live stock to the Southern Railway Company at one of the points of physical connection between its tracks and the tracks of the said Southern Railway Company in Louisville for delivery by the latter company to the Central Stock Yards, because such a delivery is practicable.

I have carefully examined the cases relied upon by the defendant. In my opinion, they are all easily distinguishable upon principle from the case at bar.

The case of Butchers' & Drovers' Stock Yards Company v. L. & N. R. R. Co., 67 Fed. Rep. 36 (14 C. C. A. 290), was not at all like the case at bar. The first sentence in the statement of facts by Judge Taft is as follows:

"This was a suit by the Butchers' & Drovers' Stock Yards Company against the Louisville & Nashville Railroad Company, *to compel it to build a spur track connecting with complainant's yards.*"

It was not a "switching" case, and there was no constitutional or statutory provision covering the case.

The case of Covington Stock Yards Company v. Keith, *supra*, merely holds that under the common law a railroad company is only required to furnish a sufficient depot upon its own lines with sufficient facilities for the business at any city. The plaintiff is not asking that the L. & N. have any other depot than the Bourbon Stock Yards, nor should it be forgotten that the Keith case was decided upon the common law, as was the Butchers' & Drovers' Stock Yards Company case; and as this case is purely and simply a *switching cose under the* 213 *Section of the Constitution*, those cases can not be said to be in conflict with the conclusion heretofore reached.

It was strenuously contended for the defendant that in the case of L. & N. R. R. Co. v. Commonwealth, 22 Ky. L. R. 328, the constitutional provision invoked herein was construed, and that the same is in harmony with the Keith case and the Butchers' & Drovers' case, *supra*. It is plain, however, that that case was solely and exclusively a *rate case* and required a construction of Section 215 of the Constitution, under which the indictment was found. It is true, that in that case the Court of Appeals held that the iron-bound rule as determined by Section 214 of the Constitution was modified by the qualifying words "*Upon the same conditions*" contained in Section 215 of the Constitution; but we may search each and every section of the Constitution and nowhere will there be found any qualifying words or limitation clause upon the mandatory requirements as contained in Section 213, and a most careful

analysis of the majority opinion in that case will show conclusively that it is not applicable, as an authority, to this case.

In brief, the question is, Shall a common carrier, acquiring its existence and powers from the State, be required to obey the Constitution of the State? In none of the cases relied upon by defendant was this the question for decision. All of those cases were tried under the common law as applicable to carriers. It must be admitted that the State has the power to compel its railroad corporations to exchange freight with each other. It can even require the carrier to deliver live stock at every stock yard on its line, but it has not done so. If there had been such a constitutional provision in Kentucky and Tennessee, it is clear that the Covington Stock Yards case and the Nashville Stock Yards case would have been decided in favor of the stock yards. If the State may go so far as to alter, amend, and even repeal the charter of a railroad company, it certainly has the power of imposing a mere regulation as to the forwarding of freight. And the State, having in its Constitution expressly required the defendant to receive and exchange cars from and with other roads, it is perfectly plain that the "stock-yard" cases, decided upon common-law principles, are not at all applicable to this case. This is not a "stock-yard" case under the common law, but a "switching" case under the Constitution.

3. Can mere inconvenience, and a moderate expense, excuse defendant from exchanging cars with other roads?

The testimony for the defendant shows that the distance from the South Louisville break-up yards of the Louisville & Nashville Railroad Company to the point of physical connection between its tracks and those of the Southern Railway Company at Seventh and Magnolia is about one and one half miles. It further appears that the distance

from the point of physical connection between the roads at Seventh and Magnolia to the Central Stock Yards is about one and one half miles, the two making a total distance from the Louisville & Nashville Railroad Company's South Louisville break-up yards via the Seventh and Magnolia physical connection with the Southern Railway Company to the Central Stock Yards of three miles, which is not quite half the distance between the said South Louisville break-up yards of the Louisville & Nashville Railroad Company and the Bourbon Stock Yards.

It also appears from the testimony of W. A. Evans, who was for twenty-three years yardmaster of the Bourbon Stock Yards, that if the Louisville & Nashville Railroad Company is required to handle live stock from its South Louisviile break-up yards to the Central Stock Yards in the same manner that said road handles stock to the Bourbon Stock Yards, a distance of about five miles in transportation of live stock is saved.

It is contended by plaintiff that where a common carrier is required to do a specific thing by a mandatory constitutional provision or legislative enactment, the question of inconvenience is put at rest by such requirement and the act must be done.

It is a conceded fact in this case that the Seventh and Magnolia streets connection is a physical connection between the tracks of the two railroad systems, and this is more than corroborated by the positive testimony as contained in the affidavits of B. H. Young and B. S. Josselyn.

Furthermore, it appears that live stock can be delivered promptly and regularly from the South Louisville break-up yards of said Louisville & Nashville Railroad Company immediately to said Magnolia street connection with the Southern Railway. In his affidavit, the president of the defendant says:

> "If cars of live stock are to be delivered promptly and regularly from the L. & N. yards at South Louisville immediately to the said Magnolia Street track, without going first to the Oak Street yards of the L. & N. R. R. Co., it will practically require the service of another switch engine and crew to do this work."

In the case of C. & N. W. R'y Co. v. The People, 56 Ill. 376, the same question of additional expense was raised as an excuse for not making immediate delivery of grain, and in response to the contention the Supreme Court of Illinois said:

> "It also admits its use, and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukee divisions is, that those divisions connect with the line on West Water Street only by a single track, and that respondent can not deliver bulk grain or other freight to the elevator of relators, even from those divisions, *without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars*, while the same are being delivered and unloaded at said elevator and brought back. *As a reason for non-delivery on the ground of difficulty, this is simply frivolous.*"

Section 216 of the Constitution provides for mere physical connection where it is *reasonable or feasible*, but does not provide for interchange of business. But after such connection is made, the question of reasonableness and feasibility is ended, and the matter of interchange of business is relegated to Section 213, where the interchange is required.

This interchange is to be done in the usual and customary way—which is by the transfer and delivery of empty or loaded cars coming to or going from the connecting roads. The commerce of the country would not tolerate the system

which required the unloading and reloading of live stock or even dead freight at connecting points (Peoria, &c., v. Chicago, &c., 109 Ill. 135). The framers of the Constitution were aware of this; hence the broad and comprehensive language of Section 213, which in effect provides for such interchange of business in the customary way. See in this connection Jackson, &c., v. Wis., &c., 40 L. R. A. 392.

If we look at the case as one in which the convenience of the Louisville & Nashville Railroad is to be taken into the account, still, there is no reason why delivery of live stock at this Seventh and Magnolia connection may not be required when the stock comes from the L. & N. to the Southern, as confessedly every day such stock bound for the northern market is delivered by the Southern to the L. & N. at such connection.

It takes a shorter time to make the delivery from the break-up yards of the L. & N. to this connection with the Southern than it does to make it to the switch leading to the Bourbon Yards, and the same switching and delay occurs at either connection or switch, the distance being greatly to the advantage of the Seventh and Magnolia connection.

There is no issue in the case as to the rate for freight carried. The defendant gets its full rate to Louisville and its charge for the additional use of its cars is compensated for by the reciprocal interchange of cars or by the usual trackage contract in force between railways using each other's cars.

No difficulties of this kind are suggested by defendant, and the refusal shown by the circular letter of the defendant is not placed on this ground.

The refusal is based on the plea of inconvenience, and this, if allowed to prevent the delivery to the Southern road at this point of connection, will be sufficient to prevent

interchange of business at most, if not all, connections of carriers, as such transfer of cars is always attended with some inconvenience. This inconvenience, however, is insignificant as compared with the necessities of commerce, which requires the interchange of cars at all points of physical connection between railways.

Of course, the Constitution does not require impossibilities; but here the interchange is shown to be both possible and practicable. Indeed, it is being constantly made in other kinds of freight—the defendant declining only to receive cars loaded with live stock destined to plaintiff's yards.

I am of opinion that plaintiff's motion for an injunction ought to be sustained, and it will be so ordered.

SHACKELFORD MILLER,

Judge.

NOVEMBER 23, 1901.

Kentucky Court of Appeals.

CENTRAL STOCK YARDS CO., . . *Plaintiff,*

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD CO., ... *Defendant.*

ORDER.

After reading the record, evidence, and authorities cited, and considered the very able arguments, both oral and written, of counsel upon the motion of the Louisville & Nashville R. R. Co. to dissolve the mandatory injunction granted in this case on the 23d of November last by the judge of the Chancery Division of the Jefferson Circuit Court, I have concluded that the motion should be overruled, and it is so ordered.

As the circuit judge has written a very full opinion and the case will probably come before the Court of Appeals for final judgment in a short time, I deem it unnecessary to write out the grounds of my conclusions as to the temporary injunction now before me.

(Signed) A. R. BURNAM,
Judge of the Court of Appeals.